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# UNDERHILL'S LAW OF TRUSTS.

FOURTH EDITION.



## Practical and Concise Manual

OF THE LAW RELATING TO PRIVATE

## TRUSTS AND TRUSTEES.

BY

## ARTHUR UNDERHILL, M.A., LL.D.,

OF LINCOLN'S INN, AND THE CHANCERY BAR, BARRISTER-AT-LAW,

Author of "A Treatise on the Settled Land Acts," "A Manual of Chancery Procedure,"
"A Summary of the Law of Torts," &c., and sometime Assistant Examiner in the
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### PREFACE.

In writing this Manual, it has been my desire to produce a book bearing the same relation to Mr. Lewin's elaborate treatise as Mr. Hawkins' work on the Construction of Wills bears to that of Mr. Jarman. That I have satisfied that desire I cannot truly say, for "Hawkins on Wills" is a model treatise; and, in spite of much care and labour, I am conscious that my efforts leave much to be desired. Still my object has been to produce a work like his, of a really practical, but at the same time concise, character.

The law libraries are rich in great works of reference, the store-houses, so to speak, of the law; but such works are, in a great measure, merely classified collections of "that codeless myriad, that wilderness of single instances," from which it requires many years of study and experience to extract general principles. That this is so was vigorously expressed by the late lamented Sir James Fitzjames Stephen in the preface to his Digest of the Law of Evidence, where he said: "It becomes obvious, that if a lawyer is to have anything better than a familiarity with indexes, he must gain his knowledge

viii PREFACE.

in some other way than from existing books on the subject. No doubt such knowledge is to be gained. Experience gives by degrees, in favourable cases, a comprehensive acquaintance with the principles of the law with which a practitioner is conversant. He gets to see that it is shorter and simpler than it looks, and to understand that the innumerable cases, which at first sight appear to constitute the law, are really no more than illustrations of a comparatively small number of principles." That great lawyer, the late Sir George Jessel, also pointed out that "the only use of authorities or decided cases is the establishment of some principle which the judge can follow out in deciding the case before him" (a).

Now, in this work I have endeavoured to extract and formulate the *principles* of the law of Private Trusts and Trustees, and, by way of example, have quoted or referred to all the important modern decisions, and a fair collection of the more ancient ones. Thus the reader is enabled to see, at a glance, the *law* (i.e. the *principle*) governing any particular point, and then he is further presented with a series of decided cases which illustrate and explain the application of that principle.

I have chosen modern cases in preference to ancient ones, because, as has been truly said, "it must not be

<sup>(</sup>a) L. R., 13 Ch. D. 712.

forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved and refined from time to time. The doctrines are progressive, refined and improved; and if we want to know what the rules of Equity are, we must look rather to the more modern than the more ancient cases" (b).

The present Edition has been very considerably enlarged by the addition of all the important decisions since April, 1888 (the date of the third Edition), by greatly amplifying the important chapter on the Duties of Trustees, and by numerous references to the recently enacted Trustee Act, 1893. I have also inserted most of the more important sections of this Act verbatim, accompanied by notes, so that the reader may have before him the very words of the Act itself.

For the reasons above stated, it is hoped (and perhaps in this fourth Edition it may be added, believed) that this will prove a useful work to practitioners in both branches of the Legal Profession.

But, in addition to practitioners, there is the large class of students. I do not expect that they will be

<sup>(</sup>b) Per Sir Geo. Jessel, M.R., in Re Hallett, Knatchbull v. Hallett, L. R., 13 Ch. D. at p. 710.

able to remember all the illustrative cases; but I am sure that the fact of these being somewhat numerous will not render the work less useful to them, but will rather tend to elucidate any difficulties which they might feel in the application of the principles which those cases exemplify. A person of ordinary industry and capacity may easily master the 81 Articles of this work, and may, without great effort, remember the main facts of such of the illustrative cases as are specially named in the body of the text, and are what may be called "leading;" and when he has done so I feel no doubt that he will possess such a knowledge of the principles upon which the court acts with regard to Private Trusts, as will enable him to pass his examination without difficulty, and also to answer all such questions as occur in the every-day experience of a general practitioner.

Lastly, I have to thank my friend and late pupil, Mr. William Arnold Jolly, B.A., of Lincoln's Inn, Barrister-at-Law, for his assistance in the passage of this book through the press.

## ARTHUR UNDERHILL.

5, New Square, Lincoln's Inn, W.C.

May, 1894.

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#### ADDENDA.

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- 206, note (i), add, "and Piddocke v. Burt, (1894) 1 Ch. 343, where it was held that one partner receiving assets of the partnership on account of himself and co-partners is not liable to imprisonment as a person acting in a fiduciary capacity."
- 208, note (p), add, "But an auctioneer is a trustee of money received by him: Crowther v. Elgood, 34 C. D. 691."
- 317, after Illust. 16, add, "16A. A trustee of personal chattels should make an inventory of them so that they may be identified: Temple v. Thring, 56 L. J., Ch. 767."
- 317, note (n), add, "And see Field v. Field, (1894) 1 Ch. 425."
- 331, line 7, add, "These include freehold ground rents: Re Peyton, 7 Eq. 463."
- 359, note (e), and 377, note (k), add, "A trustee should not permit his solicitor to have the custody of bearer bonds or other convertible securities; but he may permit his solicitor to have the custody of title deeds, at all events where frequent reference to them is necessary: Field v. Field, (1894) 1 Ch. 425."
- 361, note (g), add, "and see also Re Hetling & Merton, 42 W. R. 19."
- 387, note (x), add, "As to trustees of bearer bonds allowing one of their number, who was a stockbroker, to have the sole custody of such bonds for sale, see Re Gasquoine, (1894) 1 Ch. 470."
- 394, note (t), add, "And it is the solicitor-trustee's duty to inform the beneficiaries of their right to tax his bill: Re Webb, (1894) 1 Ch. 73."
- 419, note (g), add, "and as to discretionary trust for maintenance, see Re Bryant, (1894) 1 Ch. 324."
- 481, line 17, for "1873," read "1893."
- 492, note (k), add, "but see Eaton v. Daines, W. N. (1894) p. 32."
- 587, note (o), add, "nor because the trust fund has been embezzled by an agent of the trustee: Thorne v. Heard, 42 W. R. 274."

### Practical and Concise Manual

OF THE LAW RELATING TO PRIVATE

### TRUSTS AND TRUSTEES.

# Division I. PRELIMINARY DEFINITIONS.

- Art. 1. Definitions of Trust, Trustee, Trust Property, Beneficiary, and Breach of Trust.
  - , 2. Definitions of Legal and Equitable Estates.
  - ,, 3. Definitions of Declared (or Express) and Constructive Trusts.
  - ,, 4. Definitions of Simple and Special Trusts, and Passive, and Active Trustees.
- Art. 1.—Definitions of Trust, Trustee, Trust Property, Beneficiary, and Breach of Trust.
- A TRUST is an equitable obligation, either expressly undertaken, or constructively imposed by the Court, under which the obligor, (who is called a trustee,) is bound to deal with certain property over which he has control

(and which is called the trust property), for the benefit of certain persons (who are called the beneficiaries or cestuis que trust), of whom he may or may not himself be one. Any act or neglect on the part of a trustee which is not authorized or excused by the terms of the trust instrument, or by law, is called a breach of trust.

Examination of the above definition.—It is by no means an easy task to give a definition of that creation of judicial equity which is known to lawyers as a trust. More than one is to be found in the recognized text books; but none of these learned and excellent works contain a definition which is altogether satisfactory.

The late Mr. Lewin, in his treatise on Trusts, adopts Lord Coke's definition of a use as equally applicable to a trust, namely, "A confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, for which cestui que trust has no remedy but by subpœna in Chancery." This definition would seem, however, to be applicable to real estate only, and certainly not to trusts of choses in action, the equities attaching to which are, generally speaking, not merely collateral. The expression "some other" is also apt to mislead, and to convey the impression that the

trustee must be some other than either the person who creates the trust, or the beneficiary under it; whereas, as will be seen further on, such an impression would be incorrect. Then, so far as the remedy is concerned, the definition is obsolete. The Court of Chancery no longer exists, and all branches of the High Court take cognizance of equitable rights, although the Chancery Division is the proper branch in which to enforce express trusts.

Another eminent author, the late Mr. Spence, defines a trust as "a beneficial interest in, or beneficial ownership of, real or personal property, unattended with the possessory or legal ownership thereof"; and this definition was adopted by the late Mr. Snell, and the late Judge Josiah Smith, in their respective works on Equity. An almost similar definition is given by Mr. Justice Story, in his comprehensive work on Equity, where he says: "A trust may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof."

It would seem, however, with most unfeigned respect for the memory of those four eminent and learned writers, that their definitions are not definitions of a trust at all, but rather of the beneficial interest or property of persons in whose favour a trust is created.

Mr. H. A. Smith in his "Principles of Equity" also points out, that Mr. Spence's definition omits to take account of what are known as special

trusts, in which the object of the trust is the performance of some particular duty, rather than the vesting of beneficial ownership in some person other than the legal owner; and he defines a trust as "a duty, deemed in equity to rest on the conscience of a legal owner."

This definition, although decidedly superior to those hitherto discussed, is nevertheless not quite accurate, being both too wide and too narrow.

In the first place, it is too wide; because it would be almost, if not quite, as good a definition of any other equitable obligation.

In the second place, it is too narrow; because a person may be a trustee, without being the *legal* owner of property; e. g., he may be trustee of an equity of redemption, or of an equitable interest arising under another trust, or even of an expectancy.

I have therefore felt myself obliged to reject all the definitions above referred to, and to endeavour to construct an independent one. And in doing so it became necessary to consider the nature of a trust.

Sir Frederick Pollock, in his learned work on Contracts, concludes that a trust is, in its inception, a form of contract; but admits that the complex relations involved in a trust, cannot be conveniently reduced to the ordinary elements of a contract, and that there is sufficient justification for the course adopted by all English writers of treating trusts as a separate branch of law.

And indeed, it is sufficiently obvious that,

according to English Law, there are at least two important distinctions between contracts and trusts. In the first place, a trust, once properly declared, is binding in equity, although no valuable consideration was given for it; whereas a valuable consideration is a sine quâ non to the validity of a contract not under seal. In the second place, an executed trust may be enforced by a person for whose benefit it was made, although he may not have been party or privy to it.

At the same time, there can be no doubt that trusts are somewhat analogous to that class of common law cases, which lie on the border line between contract and tort, (of which Coggs v. Bernard (a) is the leading instance,) the principle of which is, that the confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in its performance.

However, whatever a trust may be in its inception, it radically differs from all other duties in this, that prior to recent legislation it was a duty which could not be enforced at common law, and which was only enforceable in Chancery on the ground that a breach of the duty was so unconscientious as to call for the equitable interference of the Chancellor.

It is therefore convenient to regard a trust as "an obligation," that is to say, "a tie of equity

<sup>(</sup>a) 1 Smith's L. C. 177, 6th ed., and see also Foulkes v. Metropolitan District Rail. Co., 5 C. P. D. 157.

(vinculum juris), whereby one person is bound to perform or forbear some act for another "(b).

The obligation is, or at all events in its inception was, an equitable one, enforceable only in courts of equity, although, by recent legislation, all courts take cognizance of trusts. It is also an obligation relating exclusively to property. An obligation to do or forbear some act not relating to property is not a trust, whatever else it may be. For a trust is purely a creature of equity, and equity concerns itself solely with property.

It is, further, an obligation, the due performance of which necessarily implies that the obligor has some control over the property which is the subject of the trust, for otherwise he would be unable to deal with it for the beneficiaries; and although, as will be seen hereafter, in the case of simple trusts, the control is merely nominal (consisting solely in the trustee being the depositary of the legal title), yet some scintilla of control is absolutely necessary to the existence of a trust.

It is believed, therefore, that the definition adopted in this work is fairly accurate.

ILLUSTS.—1. If a testator bequeath 1,000% to A., upon trust to invest it in government stock, and to pay the dividends to B. for life, and after B.'s death to sell the stock and divide the proceeds among B.'s children, and A. accepts the bequest, a trust is at once created in A. In other

<sup>(</sup>b) Encyc. Brit. Art. "Obligation."

words, he would be under an equitable obligation to deal with the 1,000% (the trust property) for the benefit of B. and B.'s children (the beneficiaries) according to the testator's directions.

- 2. It is, however, by no means necessary that the creator of the trust, the trustee, and the beneficiaries, should be all different people. parties at least, but no more, are always necessary. viz., a trustee, and some beneficiary beside the trustee. Thus, A. may, by deed, declare that he holds 1,000l. government stock standing in his own name and belonging to him, in trust to pay the dividends to himself for life, and after his death, upon trust to pay the dividends to his wife for life, and, after the death of the survivor of them, upon trust to sell the stock and divide the proceeds among their children. Here it will be perceived that A. is both creator of the trust, trustee, and one of the beneficiaries. If he were the sole beneficiary, the trust would never arise. Or, if he became such by surviving his wife and children, and becoming the sole personal representative and next of kin of the latter, it would cease; because the trusteeship would merge and become extinguished in the beneficial ownership.
- 3. Sometimes a trust is contingent on the happening of some future event, until the happening of which, the trustees have no control. In such cases, although the persons nominated to exercise the control are commonly called trustees, they do not in reality become so until the happening of the specified event. Thus, trustees for the

purposes of the Settled Land Act, are not in reality trustees in the strict technical sense, unless and until capital-money is paid to them under the act. Until that is done, they have no estate, and no trust to perform, and are merely watchmen, whose sole duty is to keep an eye on the tenant for life, and if he should attempt to use the powers of sale, &c. conferred on him by the act, with gross want of care, or with fraud, then to bring the matter to the notice of the court. The same remark applies to "trustees" under a settlement of freeholds, who generally take no estate, but merely a discretionary power of sale and of revoking the uses and appointing new uses to a purchaser. No doubt such persons are trustees in the sense that the settlor trusts in their discretion. but they are not trustees in the sense in which that term is used in the law of trusts, unless and until purchase-money comes into their hands by reason of their having exercised the power of which they are donees.

Art. 2.—Definitions of Legal and Equitable Estates.

The interest of a beneficiary in trust property is called an equitable estate, because it was originally only recognized in courts of equity. A legal estate, on the other hand, is that proprietary interest which has been ac-

quired with all the formalities which are required by the common or statute law for perfecting the owner's legal title, or which has devolved by legal descent. A trustee mostly, but not necessarily or always, has a legal estate in the trust property.

Distinction still important.—When the Judicature Act of 1873 was first passed, it was thought by many that the old distinctions between legal and equitable estates were abolished, and that henceforth every equitable interest would be, in effect, a legal one. Such persons, however, overlooked the fact that, even if the fusion of law and equity justified the application of the adjective "legal" to rights and interests formerly ignored by the common law, and invented by judicial equity, such a change of nomenclature would not do away with the fundamental and ineradicable distinctions which exist between legal and equitable estates. As Lord Selborne said, in introducing the Judicature Act into the House of Lords, "If trusts are to continue, there must be a distinction between what we call a legal and an equitable estate. legal estate is in the person who holds the property for another; the equitable estate is in the person beneficially interested. The distinction between law and equity is, within certain limits, real and natural, and it would be a mistake to suppose that what is real and natural ought to be disregarded, although under our present system it is often pushed beyond these limits "(c).

The old legal estate, therefore, still subsists; and although equitable estates are now recognized by all branches of the Supreme Court (and may therefore in a sense be called legal), it has been found more convenient to retain the old nomenclature, signifying, as it does, a real and substantial difference, which would still exist, even although the terms legal and equitable estates were abolished.

It must not, however, be assumed that the estate of a trustee is always legal. The estate of the beneficiary is always equitable, so long as the trust subsists; but so also may be the estate of the trustee. For instance, the trust property may consist of land mortgaged to a third party. In that case the legal estate would be in the mortgagee, an equity of redemption (which is a purely equitable estate) in the trustee, and another equitable estate in the beneficiary.

The difference between legal and equitable estates is not merely a theoretical interest. In cases of breach of trust, (as will appear later on in this treatise,) it is of vital importance, owing to the maxim that "Where the equities are equal the law prevails." In other words, where a question of priority arises between two claimants, each of whom has an equally just claim, then, if one of them has the legal estate, he will be preferred to the other, even though the title of such other

<sup>(</sup>c) Hansard, N.S., Vol. 214, p. 333.

arose before that of the claimant having the legal estate (d).

ILLUSTS.—1. A., the owner of a freehold estate, conveys it by a formal deed of grant to B., to hold in trust to receive the rents and pay them to C. during his life, and after C.'s death, upon trust to sell the land and divide the proceeds among C.'s children equally. Here, B., the trustee, would have the legal estate. According to the old doctrines of common law, he would be the absolute owner. The estates of C. and C.'s children, on the other hand, are equitable; because formerly they were only recognized by courts of equity, and still retain the incidents annexed to them by equity, although now recognized by all courts.

2. A., the owner of a copyhold estate, on the marriage of his daughter, C., covenants with her and her intended husband that he will duly vest the copyholds in B., upon trusts similar to those stated in the last illustration. Here, until the copyholds are duly surrendered by A., and until B. is duly admitted tenant on the court rolls, the latter has a mere equitable estate, although he is trustee. For copyholds can only be conveyed at common law by surrender and admittance.

<sup>(</sup>d) The reader who is desirous of verifying this statement is referred to the following cases, which have arisen since the Judicature Acts came into operation, viz.:—Cave v. Cave, 15 C. D. 639; Northern Counties Ass. Society v. Whipp, 26 C. D. 482; Garnham v. Skipper, 34 W. R. 135; Taylor v. Blacklock, 55 L. J. Ch. 99; Re Vernon, 35 W. R. 225; and see also as to the value of a legal estate, Fox v. Buckley, 3 C. D. 511; and Dixon v. Brown, 32 C. D. 597.

3. A., by will, devises a freehold estate to B. in fee simple, to the use of C. during her life, and after C.'s death, to the use of B., his heirs and assigns, for ever, in trust to sell, and divide the proceeds among C.'s children. Here, by virtue of the Statute of Uses, the legal estate is split up into a life estate in C. (who is accordingly a legal tenant for life, and not a mere beneficiary under a trust), with remainder to B. in fee simple. The trust, therefore, is a trust of the reversion, and does not become an active trust until the death of C. When that event happens, the trustee steps into possession of the rents and profits, and his fiduciary duties become active.

Art. 3.—Definitions of Declared (or Express) and Constructive Trusts.

In relation to their inception, trusts are divisible into two classes.

(1) A declared or express trust means a trust created by words evincing an intention to create a trust. If the words be contained in a document, such document is called a settlement, whether it be a simple writing, a deed, or a will. The person who provides the trust property, is called the settlor.

(2) A constructive trust means a

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trust which is not created by any words evincing an intention to create a trust, but by the construction of equity, in order to satisfy the demands of justice.

Reasons for this classification.—This classification seems to me to be preferable to that usually adopted, of express, implied, and constructive Some writers class trusts declared by words of prayer, desire, hope, or the like (precatory words), as "implied trusts." Others, on the other hand, class what are known as resulting trusts (that is, trusts arising by implication of equity in favour of a settlor where an express trust has failed, or the like), as "implied trusts." It appears to me, however, that trusts arising from precatory words are essentially express trusts that is to say, they are expressed, although in ambiguous and uncertain language. Resulting trusts, on the other hand, are clearly constructive, as they can only arise in the absence of express direction. Moreover, the whole of the law as to express trusts is applicable to trusts created by precatory expressions; and there is, therefore, no reasonable ground for treating them as a separate and distinct class.

ILLUSTS.—1. Direct express Trust.—A., by his will, devises property to B., in trust for C.; that is an express trust.

2. Express Trust by precatory Words.—A., by

his will, gives property to B., and prays or requests him to apply it for the benefit of C. and her children; that is an express trust created by precatory or ambiguous words, and would be called by some writers an implied trust.

- 3. Resulting Trust.—A., by his will, gives property to B. in trust for C., who dies before the testator. Here the trust in favour of C. lapses; but, as it is obvious that the testator never intended that B. should have the beneficial interest in the property, equity constructs a trust in favour of A.'s heir, or residuary devisee, or personal representatives, or residuary legatee, as the case may require. That is an example of that species of "constructive trust" which is known as a "resulting trust," from the Latin verb resultare, to spring back.
- 4. Pure constructive Trust.—A trustee of a leasehold house, at the termination of the lease, uses his position to induce the landlord to renew the lease to him. Here, equity regards the attempt of the trustee to snatch a personal benefit for himself, in antagonism to his beneficiaries, as an act of ill-faith, and will consequently decree that the trustee must hold the new lease upon the same trusts as he held the old and expired one. That is an instance of a constructive trust, which is not a resulting one.

ART. 4.—Definitions of Simple and Special Trusts.

In relation to the nature of the duty imposed on the trustee, trusts are divided into simple and special trusts.

- (1) A simple trust is a trust in which the trustee is a mere passive depositary of the trust property, with no active duties to perform, and who would, on the requisition of his beneficiaries, be compellable in equity to convey the estate to them or by their direction. Such a trustee is called a passive trustee.
- (2) A special trust is a trust in which a trustee is appointed to carry out some scheme particularly pointed out by the settlor, and is called upon to exert himself actively in the execution of the settlor's intention. The trustee of a special trust is called an active trustee.

ILLUSTS.—1. Thus, A. devises property unto and to the use of B. in trust for C. Here the trust is a simple trust, as the only duty which B. has to perform is to convey the legal estate to C.; and B. is a passive trustee.

2. Again, if the trust had been during C.'s life to collect the rents and profits, and to pay thereout

the cost of repairs and insurance, and to pay the residue of such rents and profits to C. during his life, and after C.'s death to hold the property in trust for D., the trust would have been a special trust during the life of C., and B. would have been an active trustee; for the trustee during that period would have had active duties to perform. But upon C.'s death, the trust would have become a simple trust, and B. a passive trustee, inasmuch as, although there were originally active duties attached to the trustee's office, those duties lapsed by the death of C., and the only duty which remained was to convey the legal estate to D.

# Division II. DECLARED OR EXPRESS TRUSTS.

#### CHAPTER I.—INTRODUCTION.

ART. 5. Analysis of a declared Trust.

## CHAPTER II.—MATTERS ESSENTIAL TO THE PRIMÂ FACIE VALIDITY OF A DECLARED TRUST.

ART. 6. Language evincing an intention to create a Trust:

- (a) Imperative Directions.
- (β) Contracts to create Trusts.
- (γ) Powers in the nature of Trusts.
- (δ) Precatory Words.
- ,, 7. Illusory Trusts.
- ,, 8. How far valuable consideration necessary to bind settlor and his representatives:
  - Where Trust completely declared or created by will, no consideration required.
  - (2) Where mere intention, or contract, to create a Trust at future date, consideration necessary.
  - (3) Who may enforce an incomplete Trust based on value.
  - (4) Parties privy to valuable consideration.
  - (5) Volunteers.
- ,, 9. What Property capable of being made the subject of a Trust.
- ,, 10. The Legality of the expressed Object of the Trust.
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## CHAPTER III.—VALIDITY OF DECLARED TRUSTS IN RELATION TO LATENT MATTERS.

- ART. 12. Who may be a Settlor.
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## CHAPTER IV.—CONSTRUCTION OF DECLARED TRUSTS.

ART. 18. Executed Trusts construed strictly, and Executory liberally.

# CHAPTER I. INTRODUCTION.

- ART. 5.—Analysis of a declared or express Trust.
  - (1) A VALID and binding declared trust is primâ facie made if
    - a. The settlor has used language evincing an intention to create a trust (a), and such intention is not negatived by the surrounding circumstances (b).
    - β. The trust is either created by will,

or based upon valuable consideration; or, (if neither,) the trust property has been either transferred to a trustee, or the settlor has constituted himself a trustee of it for the purposes of the trust (c).

- $\gamma$ . The trust property is of such a nature as to be capable of being settled (d).
- $\delta$ . The object of the trust is lawful(e).
- $\varepsilon$ . The settlor has complied with the provisions of the law as to evidence (f).

These primâ facie essentials will be examined at length in Chapter II.

- (2) But a trust, primâ facie valid, may yet be impeachable from—
  - $\alpha$ . Incapacity of the settlor (g), or of the beneficiaries (h).
  - β. Some mistake made by, or fraud practised on the settlor, upon its creation (i).
  - $\gamma$ . Fraudulent intention by the settlor, to defeat or delay his creditors (k).

<sup>(</sup>c) Art. 8. (d) Art. 9. (e) Art. 10.

<sup>(</sup>g) Art. 12. (h) Art. 13. (i) Art. 14.

 $\delta$ . Infringing the provisions of the Bankruptcy Acts(l).

 $\epsilon$ . Fraudulent intention by the settlor to defeat the claims of future purchasers from him(m).

These latent flaws will be considered in Chapter III.

(3) And lastly, the circumstances under which the trust was created, may be such as to necessitate a very liberal construction being given to the language in which it was declared, so as to give effect to the manifest intentions of the settlor(n). These questions of construction will be dealt with in Chapter IV.

<sup>(</sup>l) Art. 16. (m) Art. 17. (n) Art. 18.

#### CHAPTER II.

#### Matters essential to the primâ facie Validity of a declared Trust.

ART. 6. Language evincing intention to create a Trust.

- ,, 7. Illusory Trusts.
- ,, 8. How far valuable consideration necessary to bind the settlor and his representatives.
- What Property capable of being made the subject of a Trust.
- , 10. The Legality of the expressed object of the Trust.
- ,, 11. Necessity of writing in certain cases.

## Art. 6.—Language evincing an intention to create a Trust.

- No technical expressions are needed for the creation of an express trust(a).
   It is sufficient if the settlor indicates with reasonable certainty:
  - a. An intention to create a trust or to confer a benefit best carried out by means of one.
  - β. The purpose of the trust.
  - 7. The beneficiaries.
  - $\delta$ . The trust property (b).

<sup>(</sup>a) Dipple v. Corles, 11 Ha. 183; Cox v. Page, 10 Ha. 163.

<sup>(</sup>b) Knight v. Knight, 3 B. 148.

- (2) In particular it has been held that:
  - a. An imperative direction or declaration that property shall be held for certain expressed purposes creates a trust (c).
  - β. An agreement for valuable consideration that a trust shall be created, creates a trust.
  - $\gamma$ . A power of appointment among a class (d), unaccompanied by a gift over in default of appointment (e), creates a trust in favour of the objects of the power.
  - 3. A gift by will to a person, followed by precatory words expressive of the donor's request, recommendation, desire, hope or confidence, that the property will be applied in favour of others, may create a trust. The current of modern authority is, however, against con-

<sup>(</sup>c) As to how far gifts "upon condition" or "subject to legacies" or the like, create trusts, as distinguished from charges or conditions, see Cunningham v. Foot, 3 App. Cas. 974, and cases there cited.

<sup>(</sup>d) This principle has been extended to a power of appointment in favour of a single individual, sed quære, Tweedale v. Tweedale, 7 C. D. 633, infra, p. 31; Wheeler v. Warner, 1 S. & S. 304.

<sup>(</sup>e) Burrough v. Philcox, 5 M. & C. 92; Grieveson v. Kirsopp, 2 Ke. 653; Brown v. Higgs, 4 Ves. 708.

struing precatory words as imposing trusts; and the court will not only look to particular expressions, but see whether, on the whole will, the testator's intention was to create a trust; and regard will be had to any embarrassment and difficulty which would arise from a trust (f).

Reasons for the above rule.—The latitude of expression allowed to the creator of a trust is an instance of the maxim that "Équity regards the intention rather than the form." Wherever the intent is apparent, it will (other matters being in order) be carried into effect, however rudely or elliptically it may have been expressed.

Of course, the words "in trust for," or "upon trust to," are the most proper for expressing a fiduciary purpose; but wherever a person vests property in another, and shows an intention that such other is to apply it for the benefit of third parties, who are sufficiently pointed out, an express trust will be created, whatever form of words may have been used.

The rule that a valid agreement to create a trust in future, is sufficient to create a trust in presenti, so as to bind the property in the hands of the parties, or those having notice of the agreement,

<sup>(</sup>f) Re Diggles, Gregory v. Edmondson, 39 C. D. 253; Re Adams and Kensington Vestry, 27 C. D. 394, and cases there cited, and Mussoorie Bank v. Raynor, 7 App. Cas. 321.

depends on the maxim that "Equity regards that as done which ought to be done." It follows, therefore, that where a trust is created by an agreement to do something, it depends for its validity on the question whether the agreement is one of which Equity would decree specific performance. If, therefore, it was merely a voluntary promise (or even a covenant under seal, not supported by valuable consideration), no trust will be created; for there is nothing in the case of such an agreement which ought to be done, and therefore nothing which can, under the foregoing maxim, be considered as done, by the court. This distinction between trusts depending on contracts, and trusts actually declared, will be emphasized in Art. 8.

With regard to trusts arising out of powers of selection, where the trust property is not given over in the event of no selection being made, the court proceeds on the assumption that, by giving property to another for distribution among a class according to his discretion, and by making no provision for the destination of the property in the event of such other neglecting to make the distribution, the donor shows a clear intention that the property is to belong to the class equally, unless the donee of the power distributes it among them unequally.

The subject of precatory words at first sight presents more difficulty, for it is not easy to suppose, at the present day, that a donor intends to impose an enforceable obligation, by means of words indicating request rather than command. The explanation is to be sought in the origin of trusts, and affords a proof of how much English equity is indebted for its principles to the Roman law.

The Voconian law precluded the appointment of a female, even when an only child, as heir. In order to evade this, it became the practice of Roman fathers, to constitute, by will, a qualified male heir, upon trust that he would restore the property to the testator's daughter. Before the time of Augustus, the performance of these trusts (fidei commissa) were left entirely to the honesty and conscience of the person trusted; and consequently, it is not surprising, that testators used words of entreaty or prayer, rather than of command, well knowing that the fulfilment of their wishes was dependent on the good will of the person addressed. Thus we find that Roman testators usually adopted such forms of expression as peto, rogo, volo, fidei tuæ committo, and the like. When, in the time of Augustus, fidei commissa became enforceable, the question arose whether wills made in the old precatory form were to be considered imperative; and Justinian settled the point by ordaining that, where the intention of the testator was clear, it should be equally effectual, whether it was expressed in direct or in precatory language.

Whatever may have been the origin of uses (the predecessors of trusts) in England, there is no doubt that, at an early stage, they were (on the

Roman precedent) resorted to as a means of regaining the power of devising real estate, which had been abolished by the Norman kings. The property was granted during the owner's lifetime to a friend, who undertook to hold it to the use of the owner during his life, and after his death to such uses as he might appoint by will; and this device, although rendered unnecessary as to freeholds by the statutes 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5, and the subsequent conversion of all freehold into socage tenure, continued to be used with respect to copyholds down to 1815. The courts of common law refused to enforce these uses; and it would seem that they were commonly and notoriously used for some time before the Court of Chancery interfered. For in the reign of Henry IV., the Commons complained, that many feoffees to uses (trustees) alienated and charged the property confided to them, for which they stated there was no remedy.

Consequently, as in the case of the Roman fidei commissa, a non-enforceable trust would naturally be created by the use of precatory words, and, when the Chancellors took upon themselves to enforce trusts, they would, both on grounds of reason and on the analogy of the Roman precedents, naturally regard precatory trusts as equivalent to trusts created by more precisely imperative forms of expression.

There can be no doubt, however, that the reasons which induced the early Chancellors to construe precatory words as imperative, are no longer of the same force. Cessante ratione cessat lex; and although respect for precedent has, until quite lately, caused the court to construe such expressions as binding on the donee of property, the current is now strongly setting in the opposite direction. Lord Justice James said in the course of his judgment in the case of Lambe v. Eames (q), "In hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery, in interposing trusts, where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed. am satisfied that the testator in this case would have been shocked to think, that any person calling himself a next friend, could file a bill in this court, and, under pretence of benefiting the children, have taken the administration of the estate from the wife." And Lord Justice Baggallay, in the comparatively recent case of Re Adams and The Kensington Vestry (h), after commenting on and approving the above-cited passage from Lambe v. Eames, added: - "There being a different view adopted by Courts of Equity in more recent years, from what was adopted some years ago as regards what were called precatory trusts, it has long been decided that these views are not to be extended." And Lord Justice Cotton said, "I have no hesitation in saying myself, that I think some of the older authorities went a great deal too far, in

<sup>(</sup>g) 6 Ch. App. 599. (h) 27 C. D. 408.

holding that some particular words appearing in a will, were sufficient to create a trust. Undoubtedly confidence, if the rest of the context shows that a trust is intended, may make a trust; but what we have to look at, is the whole of the will which we have to construe. . . . Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the use of particular words; but, considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator as expressed in his will" (i). These views have been still more recently emphasized by the Court of Appeal in Re Diggles, Gregory v. Edmondson (j), in which their Lordships laid it down that, not only should the court look to the whole will, but should consider the inconvenience that might be caused by construing precatory words as imperative. On the whole it is conceived that, in future, it will require a very strong case to induce the court to imply an intention to create a trust where the testator has merely used words of prayer, hope, desire, entreaty, or the like.

ILLUSTS.—1. Trusts directly and precisely imperative.—A. devises, or grants freehold lands, unto and to the use of B., "upon trust" for C.; or "directs" him to sell it and pay the proceeds

<sup>(</sup>i) 39 C. D. 253, and see also Re Hutchinson and Tennant, 8 C. D. 540; Morrin v. Morrin, 19 L. R. Ir. 37; Mussoorie Bank v. Raynor, 7 App. Cas. 321, 330; and Moore v. Roche, 34 W. R. 343. (j) 39 C. D. 253.

to C.; or "directs" him to apply the property for the benefit of C. In all these cases a trust is created in favour of C. (k).

- 2. Contracts to create trusts.—The most usual instance of trusts lying in contract (or in fieri, to use a technical expression) is afforded by marriage articles. Not infrequently it would take so long to draw up a formal settlement, that the marriage would be unduly delayed if it were postponed until the settlement was executed. In such cases, articles of agreement are signed, by which, in consideration of the marriage, the parties agree to execute a formal settlement, vesting certain property upon certain trusts indicated more or less roughly. In such cases, although it is intended that a more formal declaration of trust shall be made, yet equity regarding that as done which ought to be done, fastens a trust on the property, and regards any dealings with it inconsistent with the agreement, as not only a breach of contract, but also as a breach of trust.
- 3. A marriage settlement contained a covenant by the settlor, to settle his estate and interest in any property or estate of or to which he should become possessed or entitled during the marriage by devise, bequest, purchase, or otherwise. He afterwards effected some policies of insurance on his life. Held, that the policies were property to which the covenantor had become entitled by purchase during the marriage, and were conse-

<sup>(</sup>k) See White v. Briggs, 2 Ph. 583.

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quently subject to the trusts of the marriage settlement (l).

4. Powers in the nature of trusts.—With regard to trusts created by words empowering another to appoint to a class with no gift over in default of appointment, the leading illustration is Burrough v. Philcox (m). There, a testator directed that certain stock should stand in his name, and certain real estates remain unalienated, "until the following contingencies are completed." He then proceeded to give life estates to his children, with remainder to their issue, and declared, that if his children should both die without issue, the properties should be disposed of as after mentioned, namely, the survivor of his children should have power to dispose by will of the said real and personal estate amongst the testator's nephews and nieces, or their children, either all to one of them, or to as many of them as his, the testator's, surviving child should think proper. It was held that a trust was created in favour of the testator's nephews and nieces, and their children, subject only to a power of selection and distribution; Lord Cottenham saying, "Where there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made.

(m) 5 My. & C. 72.

<sup>(</sup>l) Re Turcan, 40 C. D. 5; and see Re Clarke, Coombe v. Carter, 36 C. D. 348. Whether, however, trusts in this form would be good on bankruptcy, quære. See p. 73, infra, and Art. 16, infra.

the court will carry into effect the general intention in favour of the class."

- 5. And so, where a testator gave personalty to his widow for life, and to be at her disposal by her will, "therewith to apply part for charity, the remainder to be at her disposal among my relations, in such proportions as she may be pleased to direct": and the widow died without so disposing of the property; it was held that half the property was in trust for charitable purposes, and the residue for the testator's relatives according to the Statutes of Distribution (n).
- 6. A testator gave his trustees power, if his daughter married with their consent, to appoint part of her fortune, on her death, to her husband. This power was held equivalent to a trust in favour of a husband who married the daughter with the trustees' consent (o).
- ₹ 7. Precatory trusts.—With regard to precatory words, it is often a matter of difficulty to decide whether a trust is created or not. A testator bequeaths property to A., and states, either that he "hopes and doubts not" (p), "entreats" (q), "recommends" (r), "desires" (s), "requests" (t),

<sup>(</sup>n) Salusbury v. Denton, 3 K. & J. 529; Little v. Neil, 10 W. R. 592; Gough v. Bult, 16 Sim. 323.

<sup>(</sup>o) Tweedale v. Tweedale, 7 C. D. 633; but it seems very doubtful whether the reasoning of the rule in Burrough v. Philcox, applies.

<sup>(</sup>p) Paul v. Compton, 8 Ves. 380. (q) Prevost v. Clark, 2 Mad. 458. (r) Tibbits v. Tibbits, 19 Ves. 657. (s) Birch v. Wade, 3 V. & B. 198. (t) Foley v. Barry, 2 M. & K. 138; and see also Re

or "well knows" (u), that it will be applied for the benefit of B. In such cases, according to the older authorities, a trust would be created in favour of B., unless the property, or the mode of its application for B.'s benefit, were ambiguously or insufficiently stated, or unless a discretion were given to A. whether he should or should not apply it for B.'s benefit, or unless it were expressed to be given to A. "absolutely," or were accompanied by words to that effect. But, even formerly, where there were other inconsistent expressions, the precatory words would not be construed as imperative. Thus, in Green v. Marsden (x), a testator gave certain shares of freehold and leasehold houses to his wife, for her sole use and benefit, begging and requesting that at her death she would give and bequeath the same in such shares as she should think proper, and unto such members of her own family as she should think most deserving of the same. He also gave her all his moneys in the funds, and all the money he might be entitled to, for her sole use and benefit (y), begging and requesting that at her

Hutchings, W. N. 1887, p. 217, where Kay, J., held that where real estate was devised to a female, accompanied by an expression of the testator's "wish and request" that she should not sell it, the female was during coverture restrained from anticipation.

<sup>(</sup>u) Briggs v. Penny, 3 M. & G. 546; but see Stead v. Mellor, 5 C. D. 225. And as to precatory trusts generally, see notes to Harding v. Glyn, 2 W. & T. L. C. 946.

<sup>(</sup>x) 1 Dr. 646; and see Webb v. Wools, 2 Sim. N. S. 267; Re Bond, Cole v. Hawes, 4 C. D. 238.

<sup>(</sup>y) See also McCulloch v. McCulloch, 11 W. R. 504;

death she would give and bequeath what should be remaining, in such shares as she should think proper, unto such members of her own and his family as she should think most deserving. was held, that both as to the freeholds and leaseholds, and also the money, there was no trust created, but the wife took absolutely. The Vice-Chancellor said: "He gives it her for her sole use; that does not mean her separate use in the technical sense, but it means that she should have the absolute use and enjoyment,—that the property should be for the benefit of her, and of no other person than her . . . . In the bequest of the specific portion, he uses the words 'which shall be remaining at her death.' What does that mean? What it means is this,—the widow is to have it for her own sole use and benefit, that she may do as she pleases with it, that she may spend it, or give it away, or bequeath it; but he expresses his wish, not imperatively, but desiring that she may know his wish, as to what she should do with what remains."

8. A similar decision was given by the Court of Appeal, in the recent case of Re Adams and The Kensington Vestry (z). There a testator gave all his real and personal estate unto and to the absolute use of his wife, her heirs, executors,

Johnston v. Rowlands, 2 De Gex & S. 356; Meredith v. Heneage, 1 Sim. 542; Wood v. Cox, 2 M. & C. 684; Webb v. Wools, 2 Sim. N. S. 267; Abraham v. Abraham, 1 Russ. 599; Reeves v. Baker, 18 B. 372.

<sup>(</sup>z) 27 C. D. 394.

administrators and assigns, in full confidence that she would do what was right as to the disposal thereof, between his children, either in her lifetime or by will after her decease. It was held that, under these words, the widow took an absolute interest in the property, unfettered by any trust in favour of the children. This case virtually overrules the decisions of V.-C. Hall in Curnick v. Tucker (a), and V.-C. Malins in Le Marchant v. Le Marchant (b). In all three cases the precatory words were practically identical, and the only distinction between them is, that in Re Adams and The Kensington Vestry the gift to the widow was expressed to be for her "absolute use," whereas in the two other cases it was for her "sole use and benefit." This difference no doubt opens the way for the argument, that due force might be given to the words "sole use and benefit," by construing them as equivalent to "separate use"; whereas no such restrictive meaning can be attached to the expression "absolute use," and that consequently ReAdams and The Kensington Vestry does not necessarily overrule Curnick v. Tucker and Le Marchant v. Le Marchant. It would seem, however, that this distinction (which is inconsistent with Green v. Marsden (sup.) ) is too refined, having regard to the declaration of the Lords Justices, that the doctrine of precatory trusts was not to be extended, and that, in the words of Lindley, L. J., "bene-

<sup>(</sup>a) 17 Eq. 320. (b) 18 Eq. 414.

ficiaries are not to be made trustees, unless intended to be so by the testator."

9. The leaning against precatory trusts has been since emphasized in the more recent case of Re Diggles, Gregory v. Edmondson (c). In that case a testatrix gave all her property to her daughter, her heirs and assigns, followed by these words: "And it is my desire that she allows to A. G. an annuity of 251. during her life, and that A. G. shall, if she desire it, have the use of such portions of my household furniture as may not be required by my daughter." The daughter and her husband were appointed executors. On these facts, it was held by the Court of Appeal that no trust to pay the annuity was imposed upon the daughter, but that there was only a request to the daughter not binding upon her in law. At first sight this case would appear to overrule the whole doctrine of precatory trusts, but, on reading the judgments of the learned Lords Justices, it will be seen that they carefully gave reasons for their decision, which are not inconsistent with precatory words being still construed as imperative. The Lord Justice Fry said: "According to the ordinary meaning of the English language this only expresses a desire, and does not import a trust or charge. Moreover, the expression 'that she allows' implies a certain amount of discretion in the daughter. Now, consider the inconvenience of

what we are asked to decide, that there is a precatory trust affecting the whole property; that the whole property is held in trust to pay 25l. a year to Anne Gregory for her life. No fund is directed to be set apart, so if there be a trust it is a trust affecting the whole property. If so, the residuary legatee could not sell a bedstead or give away a ring without committing a breach of trust. This is a monstrous result, and we ought not so to decide unless we are forced to it by the authorities. and I do not think that any case goes to that length. . . . The later cases have established the reasonable rule that the court is to consider in each particular case what was the testator's intention. Construing this will according to the ordinary use of the English language, I think that the testatrix did not mean to tie up her whole property during the life of Anne Gregory, but to give it absolutely to her daughter, trusting to her affection and honour to make such allowance to Anne Gregory as she mentioned in her will" (d).

10. Uncertainty.—Another circumstance which will negative the fiduciary character of words, even directly importing trust, is, where they do not refer to the whole or some definite proportion of the property. Thus, in *Parnall* v. *Parnall* (e) a

<sup>(</sup>d) See also Mockett v. Mockett, 14 Eq. 49; and Wilson v. Bell, 4 Ch. App. 581.

<sup>(</sup>e) 9 C. D. 96; and see also for other instances of the absence of a definite subject-matter, Att.-Gen. v. Hall, Fitzgib. 314; Lechmere v. Lavie, 2 M. & K. 197; Bland v. Bland, 2 Cox, 349; Wynne v. Hawkins, 1 Bro. C. C.

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testator gave to his wife the whole of his real and personal property for her sole use and benefit. and continued: "It is my wish that whatever property my wife may possess at her death be equally divided between my children." It was contended that these latter words constituted a trust in favour of the children: but Vice-Chancellor Malins held that no trust was created, and that the widow took absolutely. His lordship said: "In this case there is no precatory trust, for there is not a definite gift over as there was in Le Marchant v. Le Marchant, and there is no obligation here for the widow to possess anything at her death. order to create a trust which can be carried into execution, there must be a definite subject-matter. Here the widow has a right to spend the whole of the property, and so there can be no trust affecting it."

11. The later case of Mussoorie Bank v. Raynor (f) both exemplifies the modern tendency against construing precatory words as trusts, and also the rule as to uncertainty. There, a testator gave to his widow the whole of his real and personal estate, "feeling confident that she will act justly to our children in dividing the same when no longer required by her." It was held by the Judicial Committee of the Privy Council, that the widow took an absolute interest, and that

(f) 7 App. Cas. 321.

<sup>179;</sup> Perry v. Merritt, 18 Eq. 152; Cowman v. Harrison, 10 Ha. 234; Mussoorie Bank v. Raynor, 7 App. Cas. 321; and Bretton v. Mockett, 9 C. D. 95.

the doctrine of precatory trusts did not apply. Sir A. Hobhouse, in delivering judgment, said: "Their lordships are of opinion that the current of decisions, now prevalent for many years in the Court of Chancery, shows that the doctrine of precatory trusts is not to be extended; and it is sufficient for that purpose to refer to the judgments given by Lord Justice James in the case of Lambe v. Eames, and by Sir George Jessel in the case of Re Hutchinson and Tennant . . . . Now these rules are clear, with respect to the doctrine of precatory trusts, that the words of gift used by the testator must be such that the court finds them to be imperative on the first taker of the property. and that the subject of the gift over must be welldefined and certain. If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust, because the court does not know on what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be—his appeal to the conscience of the first taker—to be imperative words. In this case nothing is given over to the children of the testator, except by an expression of confidence in his wife that she will deal justly in dividing the property among them, and that she will do it when the property is no longer required

by her. If the testator had given to his children such property as was not required by his wife, or if he had given over his property if it was not required by his wife, the gift over would, according to a very well-known and well-established class of cases, have been void, because of the uncertainty. It would have been void, not merely because the words of the gift over were precatory only, but it would have been void notwithstanding that the most direct and precise words of gift over might be used "(g).

12. The case of Lechmere v. Lavie (h) further exemplifies the principle that precatory words are not to be construed as imperative apart from the context, and also the rule as to certainty in relation to the property. There a testatrix said in her will, "I hope none of my children will accuse me of partiality in having left the largest share of my property to my two eldest daughters, my sole motive for which is to enable them to keep house so long as they remain single; but in case of their marrying, I have divided it amongst all my children. If they die single, of course they will leave what they have amongst their brothers and sisters, or their children." The eldest of the two daughters died, leaving all her property to the second. The

<sup>(</sup>g) See also Re Hutchinson and Tennant, 8 C. D. 540; and Re Bond, Cole v. Hawes, 4 C. D. 238; where the words were rather more imperative, but the decision was the same.

<sup>(</sup>h) 2 M. & K. 197; and see also Eaton v. Watts, 4 Eq. 151; Stead v. Mellor, 5 C. D. 225.

second died, leaving her property otherwise than in accordance with her mother's will. Upon this state of facts, Sir J. Leach, M. R., said: "I consider the words of this codicil as words expressing the expectation of the testatrix, but not as words of recommendation, or as intended to create an obligation upon the two eldest daughters. The words apply, not simply to the property given by the testatrix, but to all property which the daughters might happen to possess at their deaths, leaving what she gives by her will at their disposition during their lives, and extending to property which might never have belonged to her, and wanting altogether certainty of amount."

13. So in the leading case of Knight v. Knight (i), the words were: "I trust to the liberality of my successors to reward any others of my old servants and tenants according to their deserts, and to their justice in continuing the estates in the male succession according to the will of the founder of the family, my grandfather." Lord Langdale, M. R., held that these words were not sufficiently imperative, and that the subject intended to be affected, and the interest intended to be enjoyed by the objects, were not sufficiently defined to create trusts, either in favour of the servants and tenants, or of the male line (j).

<sup>(</sup>i) 3 B. 148; and see also Stead v. Mellor, 5 C. D. 225. (j) For instances of trusts held void for uncertainty as to the property, see Bardswell v. Bardswell, 9 Sim. 319; Winch v. Brutton, 14 Sim. 379; Fox v. Fox, 27 B. 301; Palmer v. Simmonds, 2 Dr. 221; Cowman v. Harrison, 10 Ha. 234.

14. In McCormick v. Grogan (k), C. made a will leaving the whole of his property to G., whom he also appointed his executor. When about to die. C. sent for G., and, in a private interview, told him of the will, and on G.'s asking whether that was right, said he would not have it otherwise. C. then told G. where the will was to be found, and that with it would be found a letter. This was all that was known to have passed between the parties. The letter named a great many persons to whom C. wished sums of money to be given, and annuities to be paid, but it contained several expressions as to G. carrying into effect the intentions of the testator as he "might think best," and also this sentence:—"I do not wish you to aet strictly on the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would if living, and as the parties are deserving; and as it is not my wish that you should say anything about this document, there cannot be any fault found with you by any of the parties, should you not act in strict accordance with it." G. paid the money to some of the persons mentioned in the letter, but not to others, who accordingly sued him; but it was held that there was no trust ereated binding on G. (1).

15. A legacy is given to a father "the better to

<sup>(</sup>k) 4 H. L. 82.

<sup>(</sup>l) Apart from the direction not being sufficiently imperative, it would seem that it was void as a trust, under the principle as to testamentary trusts enunciated in Art. 9, infra.

enable him to bring up his children." No trust is thereby created, for such words are not imperative, but only explanatory of the donor's motive (m). But where, on the other hand, there is a bequest of income to A., "that he may use it for the benefit of himself, and the maintenance and education of his children," it has been held that a trust was intended to be imposed upon A. to maintain and educate his children (n). It is, however, submitted that, having regard to the manifest tendency of recent decisions against construing such expressions as imperative, no trust would now be created by these words.

Obs.—In order to obviate any confusion in the reader's mind, it is desirable at this place to draw attention to the fact that he must carefully distinguish between cases in which (as in the foregoing) it has been held that the precatory words are not imperative and raise no trusts at all, and cases in which the words actually used, or the surrounding circumstances, make it clear that, although the donor has not sufficiently specified the property. the objects, and the way it shall go, yet he never meant the donee to take the entire beneficial interest. In such cases, which are treated of in Division III., a constructive trust is created in favour of the donor or his representatives. Cases

<sup>(</sup>m) Brown v. Casamajor, 4 Ves. 498.
(n) Woods v. Woods, 1 M. & C. 401; Crockett v. Crockett,
2 Ph. 553; and Talbot v. O'Sullivan, 6 L. R., Ir. 302; and see Bird v. Maybery, 33 B. 351; Hora v. Hora, 33 B. 88; Castle v. Castle, 1 De G. & J. 352.

of precatory words must also be carefully distinguished from those constructive trusts which arise out of the fraud of those to whom a settlor communicates a disposition which he has formally made in their favour, but at the same time tells them that he has a purpose to answer, which he has not expressed in the formal instrument, and which he depends upon them to carry into effect, and to which they assent.

## ART. 7.—Of Illusory Trusts.

Where persons are, by the form of the settlement, apparently beneficiaries, but the object of the settlor, as gathered from the whole settlement, does not appear to have been to create a trust for their benefit, they cannot call upon the trustee to carry out the settlement in their favour.

ILLUST.—1. Thus, where a person who is indebted, makes provision for payment of his debts, by vesting property in trustees upon trust to pay them, but does so behind the backs of the creditors and without communicating with them, the trustees do not become trustees for the creditors. The arrangement is one supposed to be made by the debtor for his own convenience only. It is as if he had put a sum of money into the hands of an

agent with directions to apply it in paying certain specified debts. In such a case there is no privity between the agent and the creditor (o), and the trust is revocable by the settlor at any time before the money is paid to the creditor. The case is, however, different where the creditor is a party to the arrangement; the presumption then is, that the deed was intended to create a trust in his favour, which he therefore is entitled to call on the trustee to execute (p). And so, even though he be not made a party, if the debtor has given him notice of the existence of the deed, and has expressly or impliedly told him that he may look to the trust property for payment of his demand, the creditor may become a cestui que trust (q) if he has been thereby induced to exercise forbearance in respect of his claims which he would not otherwise have exercised (r); or if he has assented to the deed and has actively (and not merely passively) acquiesced in it, or acted under its provisions and complied with its terms, and the other

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<sup>(</sup>o) Walwyn v. Coutts, 3 Sim. 14; Garrard v. Lauderdale, 3 Sim. 1; Acton v. Woodgate, 2 My. & K. 495; Bell v. Cureton, ibid. 511; Gibbs v. Glamis, 11 Sim. 584; Henriquez v. Bensusan, 20 W. R. 350; Johns v. James, 8 C. D. 744; Henderson v. Rothschild, 33 C. D. 459. But see Re Fitzgerald, 37 C. D. 18, deciding contra as to trusts for creditors after settlor's death.

<sup>(</sup>p) Mackinnon v. Stewart, 1 Sim. N. S. 88; Le Touche
v. Earl of Lucan, 7 C. & F. 672; Montefiore v. Brown, 7
H. L. C. 241; and see Smith v. Cooke, (1891) App. Cas. 297.

<sup>(</sup>q) Lord Cranworth in Synnot v. Simpson, 5 H. L. C. 241.

<sup>(</sup>r) Per Sir John Leach in Acton v. Woodgate, supra.

side has expressed no dissatisfaction, but not otherwise (s).

- 2. So, where there was an assignment of property to trustees upon trust to pay all costs, charges and expenses of the deed, and other incidental charges and expenses of the trust, and to reimburse themselves, and then to pay over the residue to third parties, it was held, that a solicitor who had prepared the deed, and had acted as solicitor to the trustees, was not a beneficiary. It was not that the trust did not provide for the costs, or that they were not to be paid, but simply that the solicitor was not a beneficiary under the trust for the payment of them; the trust might of course be enforced, but not by the solicitor (t). It is obvious that the principle also excludes from the benefit of a trust all persons who are merely auxiliary to the real object of the trust, as, for instance, auctioneers, valuers, solicitors, and other persons carrying out a sale, although the trust instrument contains a trust for payment of costs and expenses.
- 3. It was at one time considered, that a positive direction to the trustees of a will to employ a par-

<sup>(</sup>s) Per Lord St. Leonards in Field v. Donoughmore, 1 Dru. & War. 227; see also Nicholson v. Tuttin, 2 K. & J. 23; Kirman v. Daniel, 5 Ha. 499; Griffith v. Ricketts, 7 Har. 307; Cornthwaite v. Frith, 4 De G. & S. 552; Sigger v. Evans, 5 Ell. & B. 367; Gould v. Robertson, 4 De G. & S. 509.

<sup>(</sup>t) Worral v. Harford, 8 Ves. 4; Foster v. Elsley, 19 C. D. 518. See also Strickland v. Symons, 26 C. D. 243; and Stanniar v. Evans, 34 C. D. 470, negativing the right of a creditor of trustees to proceed against the estate.

ticular person and to allow him a salary, created a trust in his favour (u); but this view can no longer be supported, the House of Lords having decided the contrary in the leading ease of *Shaw* v. *Law-less* (x). Thus, a direction in a will appointing a particular person solicitor to the trust estate, imposes no trust or duty on the trustees of the will to continue such person as their solicitor in the management and affairs of the estate (y).

4. The funds voted by Parliament for the public service, are not trust funds in the hands of the secretaries of state who receive them from the treasury (z). And even where her Majesty, by royal warrant, granted booty of war to the secretary of state for India in trust to distribute amongst the persons found entitled to share in it by the Court of Admiralty, it was held that the warrant did not operate as a declaration of trust, but merely made the secretary of state the agent of the Sovereign for the purpose of distributing the fund (a). The late Lord Justice James, in giving judgment, said: "The instrument was a warrant, and I am of opinion, although the term 'grant' is used as being the effect of the warrant, that the instrument is what it purports to be, a warrant. It is a direction by the Sovereign, ordering and autho-

<sup>(</sup>u) Williams v. Corbett, 8 Sim. 349; Hibbert v. Hibbert, 3 Mer. 681.

<sup>(</sup>x) 5 C. & F. 129.

<sup>(</sup>y) Foster v. Elsley, 19 C. D. 518; Finden v. Stephens, 2 Ph. 142.

<sup>(</sup>z) Grenville-Murray v. Clarendon (Earl), 9 Eq. 11.
(a) Kinloch v. Secretary of State for India, 15 C. D. 1.

rizing that Sovereign's servant, having possession of the Sovereign's money, to deal with it in a certain way, and the word 'trust' introduced into the warrant has really no magical effect. It does not become a trust in the sense of a trust cognizable and enforceable in a court of law, because that word is used. . . . . The secretary of state (whichever secretary of state for the time being it is who has to deal with this matter), deals with it as the agent of the Crown, bound no doubt under his responsibility to Parliament, and the moral responsibility which the Crown itself has undertaken from having once made this intimation of bounty, but subject to accounting to the Sovereign, and subject to accounting to Parliament in case there is any malfeasance or nonfeasance in the matter" (b).

Art. 8.—How far Valuable Consideration necessary to bind Settlor or his Representatives.

- (1) The court will enforce a voluntary trust, even against the settlor or his representatives, if
  - a. It is created by will; or,
  - β. The settlor has transferred, or done all in his power to transfer, the trust property to a trustee; or,
  - 7. The settlor has declared or im-

## (b) Ibid, p. 8.

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- pliedly constituted himself a trustee for the purposes of the trust (c).
- (2) The court will not enforce a voluntary trust if the settlor has merely undertaken, or even covenanted, to create a trust, or otherwise manifested an incomplete intention to do so (d).
- (3) Even where valuable consideration has been given for an incomplete trust, it will only be enforced if some person privy to that consideration seeks to have it enforced (e). But if enforced at all, it will be enforced in favour of all the beneficiaries, and not merely of persons privy to the consideration. In that case the settlor, or his successors in title (other than pur-

<sup>(</sup>c) Ellison v. Ellison, 1 L. C. 245; Milroy v. Lord, 4 De G., F. & J. 264; Richards v. Delbridge, 18 Eq. 11; Exparte Pye, 18 Ves. 140; Dipple v. Corles, 11 Ha. 184; Antrobus v. Smith, 12 Ves. 39; Re Angibau, 15 C. D. 222; Re Anstis, 31 C. D. 606; Green v. Paterson, 32 C. D. 95; Re Richards, Shenstone v. Brock, 36 C. D. 541; Harding v. Harding, 17 Q. B. D. 442.

<sup>(</sup>d) Milroy v. Lord, supra. But nevertheless, where a voluntary settlor has entered into a covenant for title under seal, the grantees will at law be entitled to recover damages for breach of the covenant; Re Ford, Gilbert v. Gilbert, 63 L. T. 557.

<sup>(</sup>e) Cases cited in note (c), and Gale v. Gale, 6 C. D. 144; Colyear v. Lady Mulgrave, 2 Kee. 81; Davenport v. Bishopp, 2 Y. & C. 451; Tasker v. Small, 3 My. & Cr. 69.

chasers for value without notice), will be regarded as passive trustees, charged with the duty of transferring the trust property to active trustees when appointed (f).

(4) Persons privy to valuable considera-

tion comprise—

a. The person by whom, or at whose request, it is given (g).

B. The children of a marriage, where that marriage is itself the consideration (h).

7. Trustees for any of the fore-

going(i).

(5) A beneficiary under a voluntary trust, or who is not privy to valuable consideration (where the trust is based on value), is called a volunteer.

It is a well-known maxim, that equity gives no assistance to volunteers; but, like many other epigrammatic expressions, it cannot be accepted

<sup>(</sup>f) See Davenport v. Bishopp, supra; Dodkin v. Brunt, 6 Eq. 580; Lee v. Lee, 4 C. D. 175; Re Michell, 6 C. D. 618; Robson v. Flight, 4 De G., J. & S. 608.
(g) See per Wilde, C. J., Blandy v. De Burgh, 6 C. B.

<sup>634;</sup> Tweddle v. Atkinson, 1 B. & S. 393.

<sup>(</sup>h) See Osgood v. Strode, 2 P. W. 245; Gale v. Gale,

<sup>(</sup>i) See per Lindley, L. J., Re Anstis, Chetwynd v. Morgan, 31 C. D. 596, 606.

literally. The true rule is, that equity will give no assistance to volunteers for the purpose of enforcing an inchoate intention to confer a bounty. Where a trust has once been completely declared, or a gift completely made, equity will enforce the trust, or uphold the gift, whether the party applying for relief gave valuable consideration or not. As Mr. Justice Kay said in Henry v. Armstrong (j), "The law is, that anybody of full age and sound mind, who has executed a voluntary deed by which he has denuded himself of his own property, is bound by his own act." And the same result follows if he has declared himself, or afforded clear evidence that he considered himself, a trustee of it in præsenti. At one time it was considered, that where a man was under the erroneous belief that he had made an actual gift of property, equity would construe that as evidence that he considered himself a trustee of it for the donee. It will, however, be seen from the illustrations given below that this view can no longer be supported. For the fact that a person supposes that he has denuded himself of property cannot reasonably be accepted as evidence that he considered himself a trustee of it. On the contrary, it is inconsistent with any such theory; for a man cannot at the same time believe that he has given away property, and yet that he holds it upon trust for another. In fact, the intention to confer a voluntary benefit is not sufficient; there must be either a benefit actually

<sup>(</sup>j) 18 C. D. 668.

conferred by a legal transmutation of the thing given from the donor to the donee, or to a trustee for the donee, or else evidence that the donor actually constituted himself a trustee of the property for the donee, which evidence is afforded either by the declarations of the donor, or from a course of conduct showing that he considered himself in the position of a trustee.

With regard, however, to trusts based on valuable consideration, equity will enforce them, at the suit of a person privy to that consideration, wherever an intention appears to create a trust, whether in the present or the future. For equity considers that to be done which ought to be done; and the settlor, having received value for the creation of a trust, will be made to carry out his bargain according to the intention of the parties, however informally that intention may have been expressed, and even although no trustee has been named. For the court will never allow a trust to fail for want of a trustee, but will, if the parties have used language sufficiently explicit to enable the court to gather their intentions, fasten the trust on the estate, and, if necessary, appoint active trustees to carry it out.

Even, however, where value is given, an inchoate trust will only be enforced at the instance of a person privy thereto; and, notwithstanding some *dicta* which seem to indicate a contrary view, it is believed that there is no authority for supposing that a person who is made party to a contract for a settlement, but who is not privy to the

consideration, can enforce it (i). Where, however, a person privy to the consideration seeks to enforce an executory trust, the court will enforce it not only in his favour, but in favour of all parties, volunteers included.

It was, until quite recently, considered, that the children of a widow, who, on a second marriage, made or procured a settlement in their favour. became privy to the valuable consideration of the marriage, and could enforce the performance of a covenant or incompleted trust (i). Moreover, in Clarke v. Wright (k), some of the judges in the Exchequer Chamber went so far as to extend the marriage consideration to all relatives of an intended wife, and even to the relatives of an intended husband where he was not the settlor, on the ground that a benefit to these relatives must have formed part of the marriage bargain. It is difficult to see, however, how these persons could have been privy to the consideration, although the bargain between husband and wife was a bargain founded on value; and by a recent decision of the Privy Council (1), Clarke v. Wright was expressly overruled. In giving judgment, Lord Selborne said (speaking of the decision in Clarke v. Wright):

<sup>(</sup>i) Drew v. Marten, 2 H. & M. at p. 133; Fry, Spec. Perf. sect. 92; Tweddle v. Atkinson, 30 L. J., Q. B. 265; Chitty on Contracts (ed. 1881), p. 54.

<sup>(</sup>j) Gale v. Gale, 6 C. D. 144. (k) 6 H. & N. 849.

<sup>(</sup>l) De Mestre v. West, (1891) App. Cas. 264; and see also Mackie v. Herbertson, 9 App. Cas. 303, 337, and Re Cameron and Wells, 37 C. D. 32.

"It is apparent that the court proceeded upon the view that the case of Newstead v. Scarles (m) was an authority for the proposition that a settlement by a widow about to marry, upon her children by a former marriage, is good against a subsequent mortgagee, putting it in that general way without any reference to more special reasons. And no doubt, if that had been so, it would have been difficult to resist the conclusion drawn by the Court of Exchequer. . . In the Court of Exchequer Chamber their Lordships find a very great conflict of opinion among the judges, and plainly the majority of the judges would have been for reversing the judgment below if they had not taken the same view of Newstead v. Searles." His Lordship then proceeded to show that Newstead v. Searles and other cases were in reality no authorities for the proposition that the children of a widow by her first marriage fell within the marriage consideration on her second marriage, and on that ground expressly overruled Clarke v. Wright. It is, therefore, apprehended that although their Lordships did not express their dissent from the case of Gale v. Gale (n), in which that proposition was expressly affirmed by Mr. Justice Fry, they nevertheless have in effect overruled it as well as Clarke v. Wright.

ILLUST.-1. Part vested in trustees and part not.—In Jeffries v. Jeffries (o), a father voluntarily

<sup>(</sup>m) 1 Atk. 264.
(n) Supra.
(o) Cr. & Ph. 138; and see also Bizzey v. Flight, 24
W. R. 957, read in conjunction with the remarks of

conveyed freeholds to trustees upon certain trusts in favour of his daughters, and also covenanted to surrender copyholds to the use of the trustees, to be held by them upon the trusts of the settlement. The settlor afterwards died without surrendering the copyholds, having devised certain portions of both freeholds and copyholds to his wife. Upon a suit by the daughters to have the settlement enforced, it was held, that the court would carry out the settlement of the freeholds, for with respect to them the trust was executed, the title of the daughters complete, and the property actually transferred to the trustees. On the other hand, it refused to decree a surrender of the copyholds, for with respect to them, the settlor had neither declared himself a trustee, nor had he transferred them to the trustees, but had merely entered into a voluntary contract to transfer them, which, being a nudum pactum, was of no greater validity in equity than at law (p). It will be borne in mind, that, not only was there no evidence that the settlor considered that he had constituted himself a trustee, but the fact that he assumed to deal with the property in his will was of itself strong evidence to the contrary.

2. Executed and perfected trust enforceable by volunteers.—By a marriage settlement, the wife's property was settled (after life estates in the husband and wife), in default of children, in trust for

Lindley, L. J., in Re Patrick, Bills v. Tatham, (1891) 1 Ch. 82.

<sup>(</sup>p) And see Marler v. Tommas, 17 Eq. 8.

the wife if she should survive the husband, but in the event of the husband surviving the wife, then upon such trusts as the wife should by will appoint, and, in default of appointment, in trust for her next of kin. There was no issue of the marriage, and the wife was past the age of child-bearing, and the husband and wife sought to have the capital of the trust fund paid to them, on the ground that, although the trust was based on value, the next of kin were mere volunteers. The Court of Appeal, however, refused to permit this, Jessel, M. R., saving: "The fund has been transferred to the trustees. The fact of the next of kin being volunteers, does not enable the trustees to part with it without the consent of their cestuis que trusts. That has been the rule ever since the Court of Chancery existed." And Cotton, L. J., added: "I assume that this trust would not have been enforced if it were still executory. But this trust is executed, and the next of kin have an interest as cestuis que trusts. It is immaterial that they are volunteers. The trust cannot be broken on that account " (q).

3. Executory trust not enforceable by volunteers. —In the recent case of Green v. Paterson (r), it was held that Lord Justice Cotton's assumption in the case last cited, was correct, and that a covenant to settle future property contained in a settlement

<sup>(</sup>q) Paul v. Paul, 20 C. D. 742. (r) 32 C. D. 95; and to same effect, Morgan v. Chetwynd, 31 C. D. 596. Semble, that every assignment of future acquired property is invalid in favour of volunteers; for such assignments are in reality only contracts to assign (Collyer v. Isaacs, 19 C. D. 342).

based on valuable consideration could not be enforced by persons who were not privy to the consideration.

- 4. Another excellent example of the rule that a contract to create a trust, even where founded on valuable consideration, cannot be enforced by a volunteer, is afforded by the case of Colyear v. Lady Mulgrave (s). There, a father, who had four natural daughters and a legitimate son, entered into an agreement with the son, whereby the father covenanted to transfer the sum of 20,000l. to a trustee for the benefit of the four daughters; and the son covenanted to pay the father's debts. The son paid some of the debts, and died before the covenant by the father was performed, having by his will left the father his sole legatee and executor. It was held, that the daughters could not force the father to perform the covenant to settle 20,000% upon them, as, although the son gave value for the father's covenant, the daughters were not privy to that consideration.
- 5. Voluntary transmutation of equitable interests.—In Gilbert v. Overton(t), A., having an agreement for a lease, executed a voluntary settlement assigning all his interest in the agreement to trustees upon certain trusts. It was objected that he had not declared himself a trustee, nor intended to declare himself one, and had not conveyed the leasehold premises to the trustees; but Vice-Chancellor Wood said: "In the inception of this

<sup>(</sup>s) 2 Kee. 81. (t) 2 H. & M. 110.

transaction, there is nothing to show that the settlor had the power of obtaining a lease, before the time when he did so, after the execution of the settlement. There is, therefore, nothing to show that the settlor did not, by the settlement, do all that it was in his power to do to pass the property."

- 6. In Kekewich v. Manning (u), residuary personal estate was bequeathed to a mother for life. with remainder to her daughter absolutely. The daughter, on her marriage, assigned all her interest under the will to trustees upon certain trusts, not material to be stated, with a final trust in favour of her nieces. Although, qua the nieces, the settlement was voluntary, it was held that it was good, on the ground that the daughter had done all she could do to divest herself of her interest under the will. For she had a mere equitable remainder, and the only way in which she could transfer it was by assignment. If she had been the legal owner of the fund it would have been necessary for her to transfer it in the proper way in the books of the bank; but not being the legal owner, she did all she could do to transfer it (x).
- 7. Debts assigned, but subsequently got in by settlor.—In Bizzey v. Flight (y), A. (inter alia) as-

<sup>(</sup>u) 1 De G., M. & G. 176.

<sup>(</sup>x) The chief difficulty is to determine what is a complete assignment and what is not. See Donaldson v. Donaldson, Kay, 711; Edwards v. Jones, 1 My. & Cr. 226; and Pearson v. Amicable Assurance Co., 27 B. 229; and Fortescue v. Burnett, 3 My. & K. 36; Sewell v. King, 14 C. D. 179; Harding v. Harding, 17 Q. B. D. 442; Nanney v. Morgan, 37 C. D. 346 (equitable interest in shares); and Re Earl of Lucan, Hardinge v. Cobden, 45 C. D. 470. (y) 24 W. R. 957.

signed certain mortgage debts to trustees upon certain trusts. The settlement, however, contained no transfer of the mortgage securities. A. subsequently received the money due on some of the mortgages, the trustees receiving the money due on others. It was held by Hall, V.-C., that as the mortgaged property was not transferred to the trustees, the settlement was essentially incomplete, and, being a voluntary settlement, was void. In a more recent case before the Court of Appeal, however (z), in which the only difference was that the mortgage was a bill of sale of chattels, the court held that the settlement was complete and binding, and threw some doubt on the correctness of the decision in Bizzey v. Flight. It appears, however, that their lordships distinguished the two cases on the ground that a bill of sale was different to a mortgage of land, in which a transferee of the debt would be unable to give a receipt for the money unless he could re-convey the mortgaged property, whereas, on payment of a bill of sale, no re-assignment of the mortgaged chattels is required.

8. Declaration of trust implied from conduct.—A testator bequeathed 2,000% on certain trusts, and he empowered his executor (who was also his residuary legatee) to retain the amount in his hands uninvested, he paying interest thereon at four per cent. per annum. After the testator's death, the executor, being satisfied that the

<sup>(</sup>z) Re Patrick, Bills v. Tatham, (1891) 1 Ch. 82.

testator intended to bequeath 3,000l. and not 2,000%, said to the legatee's father: "It shall make no difference, and I will take care that he (the legatee) shall have 1,000% more than he is entitled to by the will." Subsequently he signed a memorandum in these words: "By the will, &c. of the late S. G. the said J. G. (the executor) pays to T. W. (the legatee), the annual sum of 1201, by two equal payments, viz., the 6th July and the 6th January in each year, being interest at four per cent. on 3,000%." He also signed a further memorandum, stating that he had told the legatee that he should make the 2,000%, up to 3,000%; and down to his death he in fact paid interest on the 3,0001. On these facts, it was held that the executor had effectually declared himself a trustee of the additional thousand. The late Lord Romilly, in giving judgment, said: "The distinction between the cases is, that where a trust, though voluntary, is complete, the cestui que trust (although he cannot call on the court to complete a trust) may call on the court to execute one that is completed. I have, therefore, only to consider whether in this case the relation of trustee and cestui que trust exists. . . . The testator says to his son and executor, 'You may invest this or not as you please, but if you retain it, you must pay interest for it at four per cent.' Could he (the executor) after proving his father's will, and taking possession of assets amply sufficient for payment of the legacy, say he was not a trustee of that 2,000%? That would be impossible. . . .

Then what takes place is this:—Upon the death of the testator, his son (the executor) says, in substance, 'My father told me that he intended to bequeath the sum of 3,000l., not 2,000l., and he firmly believed that he had put 3,000l. in the will, whereas it was only 2,000l.; and that being so, I intend to follow his directions.' Thereupon he signs this statement. How can I distinguish the 3,000%. from the 2,000%? Is he not in the same relation with respect to the 3,000l., as he would have been with regard to the 2,000l.? If he had invested 2,000%, only, and not 3,000%, something might have been said. But suppose he had invested the 3,000l., would it not have been clear that there was a declaration of trust in respect of that 3,000l. though invested in his own name? This paper is a clear declaration of trust of that 3,000l., and according to the permission contained in his father's will, he, instead of investing it, holds it in his own hands, and the whole fund stands in the same situation "(a).

9. Again, a testatrix gave her personal estate to B. for the benefit of B.'s daughters. B. invested the produce, together with 1,000*l*. of his own moneys, in the funds in his own name, and afterwards treated and admitted the aggregate fund as held in trust for his daughters. On his death the fund was found mixed with like funds of his own. It was held that, under the circumstances, there was sufficient to show that B. considered

<sup>(</sup>a) Gee v. Liddell, 35 B. 621.

himself a trustee of the 1,000l. in favour of his daughters (b).

- 10. In Ex parte Dubosc (c) the alleged settlor wrote to an agent in Paris, authorizing him to purchase (and the agent accordingly did purchase) an annuity for the benefit of a lady whom he named; but as the lady was married, and also deranged, the annuity was purchased in the name of the settlor. The settlor then sent the agent a power of attorney, authorizing him to transfer the annuity to the lady, which he did not do till after the settlor's death. It was nevertheless held, that the settlor had considered himself a mere trustee for the lady, and had never intended the annuity for himself, but for her, and that therefore the trust was good.
- 11. Imperfect gift not construed as declaration of trust.—On the other hand, although some judges have held that an instrument executed as a present assignment (but in reality not operative as such) is equivalent to a declaration of trust (d),

(c) 18 Ves. 140 (otherwise Ex parte Pye); and see also Re Bellasis, 12 Eq. 218.

<sup>(</sup>b) Thorpe v. Owen, 5 B. 224; and see also Armstrong v. Timperon, W. N. 1871, p. 4.

<sup>(</sup>d) In Richardson v. Richardson, 3 Eq. 686, Vice-Chancellor Wood (afterwards Lord Hatherley), and in Morgan v. Malleson, 10 Eq. 475, Lord Romilly, and in Badderley v. Badderley, 9 C. D. 113, Vice-Chancellor Malins. The former very learned judge said: "An instrument executed as a present and complete assignment, not being a mere covenant to assign on a future day, is equivalent to a declaration of trust; the real distinction that should be made is between an agreement to do something when called upon, something distinctly expressed

the balance of authority is unmistakeably the other way, on the ground that an intention to create a trust is essential to the creation of one; and that when a man purports to make a gift or an assignment, he cannot reasonably be supposed to have intended to declare himself a trustee—a character which assumes that he retains the pro-

to be future in the instrument, and an instrument which affects to pass everything, independently of the legal estate. . . . The expression used by the Lord Justice in Kekewich v. Manning is this: 'A declaration of trust is not confined to any express form of words, but may be indicated by the character of the instrument.' Reliance is often placed on the circumstance that the assignor has done all that he can-that there is nothing more for him to do; and it is contended that he must, in that case only, be taken to have made a complete and effectual assignment. But that is not the sound doctrine on which the case rests, for if there be an actual declaration of trust, although the assignor has not done all he could do-for example, although he has not given notice to the assignee, yet the interest is held to have effectually passed as between the donor and the donee. The difference must rest on this—aye or no, has he constituted himself a trustee?" It will be perceived that the learned Vice-Chancellor did not dissent from or add to the recognized rule stated in Article 6. Where he differed from the previous authorities was in deciding that an instrument, purporting to be an assignment, although void as such, was nevertheless good as a declaration of trust. This view has been expressly dissented from by Vice-Chancellor Bacon in Warriner v. Rogers, 16 Eq. 340, and by Sir George Jessel, M. R., in Richards v. Delbridge, 18 Eq. 11, and by Vice-Chancellor Hall in Breton v. Wolvern, 19 C. D. 416. The decision also seems to be inconsistent with Lord Cranworth's judgment in Jones v. Locke, infra, and with Heartley v. Nicholson, 19 Eq. 233, and Re Shield, Pethybridge v. Burrow, 53 L. T. 5, and it is submitted that, both on principle and authority, the law as laid down by the Master of the Rolls in Richards v. Delbridge, is accurate.

perty. Thus in Antrobus v. Smith (e), the alleged settlor made the following endorsement on a share held by him in a public company: "I do hereby assign to my daughter B. all my right, title and interest of and in the enclosed call, and all other calls, in the F. and C. Navigation." The share was not handed over to the daughter, and the endorsement did not operate as a valid assignment of the share; but it was attempted to enforce the assignment by contending that the endorsement operated as a valid declaration of trust. The court, however, rejected this view, the Master of the Rolls saying: "Mr. Crawfurd (the alleged settlor) was not in form declared a trustee, nor was that mode of doing what he proposed in his contemplation. . . . He meant a gift, and there is no case in which a party has been compelled to perfect a gift which in the mode of making it he has left imperfect."

12. Again, a settlor had children by a first wife, and one son (an infant) by a second wife. One day on his return from a journey, the infant's nurse said, "You have come back from Birmingham, and have not brought baby anything"; upon which the settlor answered, "Oh! I gave him a pair of boots, and now I will give him a handsome present." He then went upstairs and brought down a cheque which he had received for 900%, and said, "Look you here, I give this to baby; it

<sup>(</sup>e) 12 Ves. 39. Shares or stocks must be transferred according to the company's regulations (Société Générale v. Walker, 11 App. Cas. 20; Roots v. Williamson, 38 C. D. 485; Mutual Prov. Socy. v. Macmillan, 14 App. Cas. 596).

is for himself; I am going to put it away for him, and will give him a great deal more with it; it is his own, and he may do what he likes with it." He then put the cheque away. He had previously told his solicitor that he intended adding 1001, to the cheque, and investing it for the infant's benefit. A few days after the above took place, he suddenly died, leaving the child penniless. The child's mother contended that the settlor had made a valid declaration of trust in favour of the child. Lord Cranworth, however, said (f): "I regret to say that I cannot bring myself to think, either on principle or authority, that there has been any gift or any valid declaration of trust. No doubt a gift may be made by any person, sui juris and compos mentis, by conveyance of real estate, or by delivery of a chattel, and there is no doubt also that, by some decisions, a parol declaration of trust of personalty may be perfectly valid, even when voluntary. If I give any chattel, that of course passes by delivery; and if I say, expressly or impliedly, that I constitute myself a trustee of personalty, that is a trust executed and capable of being enforced without consideration. The cases all turn upon the question whether what has been said was a declaration of trust or an imperfect gift. In the latter case the parties would receive no aid from a court of equity if they claimed as volunteers. But when

<sup>(</sup>f) Jones v. Locke, 1 Ch. App. 25; and see also Marler v. Tommas, 17 Eq. 8; and see, as to imperfect gifts at common law, Irons v. Smallpiece, 2 B. & Ald. 551; and Cochrane v. Moore, 25 Q. B. D. 57.

he - or

there has been a declaration of trust, then it will be enforced, whether there has been consideration or not."

13. So in Milroy v. Lord (q), Lord Justice Turner laid it down that, "In order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property, and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes. But in order to render the settlement binding, one or other of these modes must (as I understand the law of this court) be resorted to. for there is no equity in this court to perfect an imperfect gift."

14. An excellent example of the rule now under consideration is afforded by the modern case of *Pethybridge* v. *Burrows* (h). A. informed F. that he intended to give her a debenture bond for 1,000l. Shortly afterwards he signed the follow-

<sup>(</sup>g) 4 De G., F. & J. 264.

<sup>(</sup>h) 53 L. T. 5. This case seems to be inconsistent with V.-C. Hall's decision in Re King, Sewell v. King, 14 C. D. 179, the authority of which is respectfully questioned. See also Vincent v. Vincent, 35 W. R. 7; and Re Smith, Champ v. Marshallsay, 64 L. T. 13.

U.-T.

ing memorandum:-"I wish to communicate to my executors, that I have to-day given to F. my 1,000% debenture bond of the S. and L. Co. But as I shall require the annual dividends to meet my necessary expenses, I retain the document in my possession for my lifetime, requesting you on my decease to hand it over to F., and communicate to the secretary of the railway company relative to the transfer of the said bond being entered in their books. Given under my hand this 9th day of February, 1882. As witness my hand, G. S. P.S.—You will find the bond in my deed-box, attached to this memorandum." After the testator's death, the certificate was found as stated. Held, reversing Pearson, J., that the memorandum was not equivalent to a declaration of trust, and that F. was not entitled to the bond.

an exception (or a seeming exception) to this principle in the case of husband and wife. In Grant v. Grant (i), the Master of the Rolls said: "I apprehend the fact of the transaction taking place between husband and wife, instead of between strangers, makes no difference further than this, that in the case of a gift of chattels from one stranger to another, there must be a delivery of the chattels in order to make the gift complete, whereas in the case of husband and wife there cannot be a delivery, because, assuming they

<sup>(</sup>i) 34 Bea. 623; followed by Malins, V.-C., in *Badderley* v. *Badderley*, 9 C. D. 113, and by Bacon, V.-C., in *Fox* v. *Hawkes*, 13 C. D. 822.

are given to the wife, they still remain in the legal custody of the husband." However, the more recent decision of Vice-Chancellor Hall, contra, in Breton v. Wolvern (k), has thrown considerable doubt on the soundness of that case. There, a husband, by three letters written and signed by him and handed to his wife, gave her furniture and other articles for her sole and absolute use. It was contended on the part of the wife, that the husband had by these letters constituted himself a trustee for the wife, because it was impossible for the husband to make a gift of them to her, inasmuch as the legal interest would have at once revested in him jure mariti, and that therefore there was a difference between an imperfect gift to a stranger and an attempted gift to a wife. However, the learned Vice-Chancellor in an elaborate judgment, while expressing his sorrow that he could not decide in favour of the wife. "because it is a monstrous state of the law which prevents effect being given to such gifts," found himself unable to support the gift, and pointed out that the above quotation from the judgment of the M. R. in Grant v. Grant was merely a dietum, and that in his opinion the subsequent cases of Badderley v. Badderley and Fox v. Hawkes could not be supported. The point has now lost some of its interest, from the fact that since the passing of the Married Women's Property Act, 1882,

<sup>(</sup>k) 17 C. D. 416.

gifts made by a husband to a wife are as valid as gifts made by one stranger to another.

16. Form immaterial where parties to valuable consideration sue. - With regard to trusts based on valuable consideration, and which are sought to be enforced by persons privy to that consideration, the following examples may serve to elucidate the doctrine of the court. A marriage settlement contains a covenant by the intended husband that he will transfer to the trustees any property which may accrue to him in right of his wife during the marriage. Upon any property so becoming vested in him, he immediately becomes a trustee of it, upon trust to transfer it to the trustees; and until that is done he himself holds it upon the trust declared in the settlement (1). Not only, therefore, is there an action for breach of covenant maintainable against him, but the actual property is burdened and charged with the executory trust (m), and any volunteer taking it would take it burdened with that trust; and so would a purchaser if he had notice of the trust, as will be seen hereafter.

17. As an example of how much more equity regards the intention than the form, the case of Lee v. Lee (n) may be cited. There, by an antenuptial agreement made in consideration of the

<sup>(1)</sup> Lewis v. Madocks, 8 Ves. 150; Wellesley v. Wellesley,

<sup>(</sup>n) Lewis v. Madocks, S. Ves. 130, M. Reisley, V. M. & C. 561; Lyster v. Burroughs, 1 Dr. & W. 149.
(m) Lewis v. Madocks, supra; Hastie v. Hastie, 2 C. D. 304; Agar v. George, ib. 706; Cornmell v. Keith, 3 C. D. 767. But as to the effect of the covenantor's bankruptcy before the expectancy vests, see Collyer v. Isaacs, 19 C. D. 342.

<sup>(</sup>n) 4 C. D. 175.

marriage between the plaintiff and the lady who afterwards became his wife, the wife's parents agreed to appoint to her a share in real estate, and the plaintiff agreed that he would settle such share upon certain trusts. The wife was a party to, and executed, the agreement, but did not expressly covenant to settle the property. She afterwards died without the property having been settled in accordance with the agreement, and the property descended at law to her heir. It was, however, held that the obvious intention of all parties to the agreement was that the property should be settled, and although the wife did not in express terms undertake to settle it, yet as she was a party to the agreement she was bound to do all in her power to carry it out, and that consequently the property was bound by the executory trust, and the heir (at the suit of a person privy to the consideration) was bound to do all things necessary for getting the property settled according to the agreement.

18. No Trustee.—Where, before the Married Women's Property Act, 1882, money was bequeathed to a married woman for her separate use, it became at law the husband's property; but in equity he was regarded as a mere trustee for his wife (o).

19. So if the trustee appointed, fails, either by

<sup>(</sup>o) Rollfe v. Budder, Bunb. 187; Tappenden v. Walsh, 1 Ph. 352; Prichard v. Ames, T. & R. 222; Green v. Carlill, 4 C. D. 882; and see Bennett v. Davis, 2 P. W. 216.

death (p), or disclaimer (q), or incapacity (r), or otherwise (s), the trust does not fail, but fastens upon the conscience of any person (other than a purchaser for value without notice) into whose hands the property comes (t); and such person holds it as a passive trustee, whose duty is to convey it to new trustees properly appointed (u).

20. Again, if a testator directs a sale of lands and a division of the proceeds, but names no person to sell, and does not in terms devise the property, it descends at law to his heir; but the latter is regarded in equity as a mere passive trustee, who is bound to convey the legal estate to trustees appointed by the court for the purpose of carrying out the trust (x).

Art. 9.—What Property is capable of being made the Subject of a Trust.

All property, real or personal, legal or equitable, at home or abroad, and

 <sup>(</sup>p) Moggridge v. Thackwell, 3 B. C. C. 528; Att.-Gen.
 v. Downing, Amb. 552; Tempest v. Lord Camoys, 35 Beav.
 201.

<sup>(</sup>q) Backhouse v. Backhouse, quoted by Lew. 678; Robson v. Flight, 4 De G., J. & S. 608.

<sup>(</sup>r) Sarley v. Clockmakers' Co., 1 B. C. C. 81.

<sup>(</sup>s) Att.-Gen. v. Stephens, 3 M. & K. 347. (t) See per Wilmot, C. J., Att.-Gen. v. Lady Downing, Wil. 21, 22.

<sup>(</sup>u) Robson v. Flight, 4 De G., J. & S. 608. (x) 1b., and Pitt v. Pelham, Free. 134.

whether in possession or action, remainder, reversion, or expectancy, may be made the subject of a trust, unless-

- (1) The policy of the law or any statutory enactment prohibits the settlor from parting with the beneficial interest in it; or,
- (2) Being real estate, the tenure under which it is holden is inconsistent with the trust sought to be created (y).

ILLUST.—1. Equitable Interests.—A person, holding an agreement for a lease, assigned all his interest under it to trustees upon certain trusts. Here, although the legal term was not in the settlor, it was held to be a good settlement, because he had conveyed his equitable interest in the property (z).

2. Choses in Action.—A. owes 1,000l. to B. B. assigns this debt to trustees upon certain trusts.

This transaction is perfectly good (a).

(z) 2 H. & M. 110; and see also Knight v. Bowyer, 23 Beav. 635.

<sup>(</sup>y) See Nelson v. Bridport, 8 B. 574; and Allen v. Bewsey, 7 C. D. 453.

<sup>(</sup>a) Prior to the Judicature Act, 1873, debts and other legal choses in action were not assignable at law on the ground (as put by Lord Coke), that it "would be the occasion of multiplying of contentions and suits, of great oppression of the people, and the subversion of the due

- 3. Reversionary Interests.—A. settled upon his wife and children certain real estate to which, under the will of his uncle, he was entitled in reversion. Held good (b).
- 4. Expectancies.—In Wethered v. Wethered (c) an agreement was entered into between two sons, to divide equally whatever property they might receive from their father in his lifetime, or become entitled to under his will, or by descent, or otherwise. It was held that this agreement was binding, although made in respect of a mere possibility, and V.-C. Shadwell said: "It is clear that if the testator meant that his devisee should have the personal enjoyment of his bounty, he might so devise as to stint the enjoyment of the

(c) 2 Sim. 183.

and equal execution of justice" (10 Co. 48). But even at law negotiable instruments (as debentures, bills of exchange, and promissory notes made negotiable) were exceptions to the rule; and so were all contracts where a novation took place, that is to say, where both parties to the original contract assented to the transfer of the interest of one of them (Buron v. Husband, 4 B. & Ad. 611). Equity, however, almost always, from its earliest days, disregarded the legal doctrine, and freely enforced contracts for the sale of choses in action; and now, by 8 & 9 Vict. c. 106, s. 6, contingent and future interests and possibilities, coupled with an interest in real estate, may be granted or assigned at law. But not so possibilities in personal estate, as to which see Joseph v. Lyons, 15 Q. B. D. 280; and Collyer v. Isaacs, 19 C. D. 342. By 30 & 31 Vict. c. 144, policies of life assurance may be legally assigned, and by 31 & 32 Vict. c. 86, a similar relaxation of the law was introduced in favour of marine policies; and finally, by the 6th section of the Judicature Act, 1873, debts and other legal choses in action may be assigned at law, where the assignment is absolute and not by way of charge only.
(b) Shafto v. Adams, 4 Giff. 492.

devisee, and restrain him from alienating the subject of the gift; but that if the testator did not so devise, it must be intended that he meant that his devisee should not be so stinted, but should have the full enjoyment of the property. and that it should be liable to all his antecedent debts, and all his antecedent contracts; and therefore, that where there was a general devise, the property was liable to be encumbered in any way that the devisee might think proper either before or after he took it" (d). As to the effect of the settlor's bankruptcy before the expectancy vests however, see Bankruptcy Act, sect. 47 (2), and Collyer v. Isaacs (d), and sect. 16, infra.

5. Property inalienable by reason of public policy.—Salaries or pensions given for enabling persons to perform duties connected with the public service, or to enable them to be in a fit state of preparation to perform those duties, are inalienable. In Grenfell v. Dean and Canons of Windsor (c), the Master of the Rolls explained the true reasons for this doctrine. In that case, a canon of Windsor had assigned the canonry and the profits to the plaintiff to secure a sum of money. There was no cure of souls, and the only duties were residence within the castle and attendance in the chapel for twenty-one days a-year.

<sup>(</sup>d) See also Beckley v. Newland, 2 P. W. 182; Harwood v. Tooke, 2 Sim. 192; Higgins v. Hill, 56 L. T. 426; Collyer v. Isaacs, 19 C. D. 342; Re Clarke, Coombe v. Carter, 36 C. D. 348; Tailby v. Official Receiver, 13 App. Cas. 523; Morgan v. Hardy, ib. 354; and Thomas v. Kelly, ib. 506.

<sup>(</sup>e) 2 Beav. 554.

In giving judgment for the plaintiff and upholding the assignment, his Lordship said: "If he (the Canon) had made out that the duty to be performed by him was a public duty, or in any way connected with the public service, I should have thought it right to attend very seriously to that argument, because there are various cases in which public duties are concerned in which it may be against public policy that the income arising from the performance of those duties should be assigned; and for this simple reason, because the public is interested not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them. Such is the reason in the cases of half-pay, where there is a sort of retainer, and where the payments which are made to officers from time to time are the means by which they—being liable to be called into public service—are enabled to keep themselves in a state of preparation for performing their duties." So, in Davis v. Duke of Marlborough (f), the Lord Chancellor said: "A pension for past services may be aliened, but a pension for supporting the grantee in the performance of future duties is inalienable." The emoluments of ecclesiastical livings were expressly made inalienable by 13 Eliz. c. 20, and 57 Geo. 3, c. 99.

6. Property inalienable by Statute.—Some classes of property are expressly made inalienable by statute. Thus, in *Davis* v. *Duke of Marlborough*,

a pension was granted by statute to the duke and his successors in the title "for the more honourable support of the dignities." It was held, that the object of parliament being, that "it should be kept in mind that it was for a memento and a perpetual memorial of national gratitude for public services," it was inalienable. Pay, pensions, relief, or allowance payable to any officer of her Majesty's forces, or to his widow, or to any person on the compassionate list, are also made unassignable by statute (g). So also is the pay of seamen in the navy (h), and half-pay in the marine forces (i); but it would seem that the right to pay actually due at the date of the assignment is assignable (k). Salaries or pensions, not given in respect of public services, are freely assignable (1).

7. Trust inconsistent with tenure.—Where, with respect to copyhold lands, there is no custom to create an estate tail in the manor of which they are holden, an equitable estate tail cannot be created by way of trust: for that would be inconsistent with the tenure (in other words, with the conditions) under which the lands are holden (m). But, on the other hand, where a trust is not in-

(k) Ibid. s. 54.

(m) Allen v. Bewsey, 7 C. D. at p. 466.

<sup>(</sup>g) 47 Geo. 3, sess. 2, c. 25, ss. 1—14. (h) 1 Geo. 2, c. 14, s. 7. (j) 11 Geo. 4 & 1 Will. 4, c. 20, s. 47.

<sup>(</sup>l) Feistel v. St. John's College, 10 Beav. 491; and for other cases bearing on assignments of salaries and pensions, see Stone v. Lidderdule, 2 Anst. 533; Arbuthnot v. Norton, 5 Moore, P. C. C. 219; Carew v. Cooper, 10 Jur. N. S. 429; Alexander v. Duke of Wellington, 2 Russ. & My. 35.

consistent with the custom of a manor, it will be valid, although legal estates to the same extent could not be created (n).

8. Trusts of foreign land.—The same principle holds in the case of lands situated abroad, even if such lands are capable of being settled by way of special trust at all, a point which is not free from doubt (o).

# \*\*Art. 10—The Legality of the Expressed Object of the Trust.

- (1) A trust created for an illegal purpose is void (p); but it will not vitiate other trusts or provisions in the settlement unconnected with such illegal purpose (q);
- (2) The following illegal trusts are those which most occur in practice:
  - a. Trusts for unreasonable accumula-

<sup>(</sup>n) Allen v. Bewsey, 7 C. D. at p. 466.

<sup>(</sup>o) Glover v. Strothoff, 2 B. C. C. 33; Nelson v. Bridport, 8 B. 570; Martin v. Martin, 2 R. & M. 567.

<sup>(</sup>p) Lew. 74; Att.-Gen. v. Sands, Hard 494; Pawlett v. Att.-Gen., ib. 469; Burgess v. Wheate, 1 Ed. 595; Duke of Norfolk's case, 3 Ch. Cas. 35.

<sup>(</sup>q) H. v. W., 3 K. & J. 382; Cartwright v. Cartwright, 3 D. M. & G. 982; Merryweather v. Jones, 4 Giff. 509; Cocksedge v. Cocksedge, 14 Sim. 244. The reader must not, however, assume from this, that where a trust is void under the rule against perpetuities, subsequent remainders are valid, and are merely accelerated. All remainders after a remote gift are void, although gifts alternative to one void for remoteness may be good, as to which, see Evers v. Challis, 7 H. L. C. 531; Watson v. Young, 28 C. D. 436; Re Harvey, Peek v. Savory, 39 C. D. 289; and Re Bence, Smith v. Bence, (1891) 3 Ch. 242.

- tion (r), or the tying up of property for an unreasonable period;
- 6. Trusts providing for the continued enjoyment of the trust property by a beneficiary in derogation of the rights of creditors (s);
- Trusts restricting that power of alienation which the law has annexed to the ownership of property (t);
- 5. Trusts promoting or encouraging immorality (u), fraud or dishonesty;
- E. Trusts tending to the general restraint of marriage (x) (unless of a second marriage) (y);
- ζ, Simoniacal trusts;
- 7. Trusts in derogation of the Mortmain Acts.

<sup>(</sup>r) Cadell v. Palmer, Tud. L. C. Conv. 424; Griffith v. Vere, ib. 497.

<sup>(</sup>s) Graves v. Dolphin, 1 Sim. 66; Snowdon v. Dales, 6 Sim. 524; Brandon v. Robinson, 18 Ves. 429.

<sup>(</sup>t) Floyer v. Bankes, 8 Eq. 115; Sykes v. Sykes, 13 Eq. 56.(u) Bladwell v. Edwards, Cro. Eliz. 509.

<sup>(</sup>x) See per Wilmot, L.C.J., in Low v. Peers, Wil. Op. & Jud. 375; Morley v. Reynoldson, 2 Ha. 570; Lloyd v. Lloyd, 2 Sim., N. S. 255; Story, 283.

<sup>(</sup>y) Marples v. Bambridge, Mad. 590; Lloyd v. Lloyd, supra; Craven v. Brady, 4 Ch. App. 296; and as to second marriage of a man, Allen v. Jackson, 1 C. D. 399.

- ILLUST.—1. Conditional limitations.—At common law, a fee simple estate could not (except by executory devise) be made to shift from one person to another; but before the Statute of Uses the same object was gained by means of shifting uses, which were then mere equitable interests; and by means of that statute it was rendered allowable at law.
- 2. Special trust of chattels.—So, again, a chattel cannot, at law, be limited to one for life, with remainder to another absolutely; but the same object can nevertheless be attained through the medium of a trust (z).
- 3. Period of suspended vesting of beneficial interest.—At law, the freehold must always be in some person in esse, which is often expressed by saying, that a remainder requires a particular estate of freehold to support it. This is, however, a rule of tenure, the reasons for which do not now apply; and a trust imposed upon the legal owner to deal with the equitable freehold in a particular way would be perfectly valid, although it provided for a period of suspended vesting—as, for instance, a trust to accumulate the rents and profits. But if, on the other hand, a trust is inconsistent with the conditions or customs under which land is held (ex. gr., a devise of copyholds to A. in fee, in trust for B. in tail, where the custom of the manor does

<sup>(</sup>z) Lew. 75.

not allow the copyholds to be entailed), the trust will be void (a).

4. Rule against perpetuities. - It is against public policy that property should be settled on special trusts for an indefinite period, so as to prevent it being freely dealt with; and consequently, the power of doing so has been curtailed by a rule known as the rule against perpetuities. That rule is, that every future limitation, whether by way of legal remainder, executory devise, or trust of real or personal property, the vesting of which absolutely as to personalty, or in fee or tail as to realty, is postponed beyond lives in being and twenty-one years afterwards (with a further period for gestation where it exists), is void (b). This rule does not, however, apply to interests following estates tail, as they can be barred (c); nor to charitable bequests (d); nor to parliamentary grants for distinguished services; nor to trust for the accumulation of income for payment of the settlor's debts (e). It is impossible within the scope of this work to go into the numerous questions which arise under this rule, for the elucidation of which the reader

<sup>(</sup>a) But see as to trusts which would, if legal estates, be void as contrary to the customs of a manor, Allen v. Bewsey, 7 C. D. 453.

<sup>(</sup>b) Cadell v. Palmer, 1 Cl. & Fin. 372; London & S. W. Ry. Co. v. Gomm, 20 C. D. 562.

<sup>(</sup>c) Heasman v. Pearce, 7 Ch. App. 275.

<sup>(</sup>d) Christ's Hospital v. Grainger, 1 M. & G. 460. (e) Lord Southampton v. Lord Hertford, 2 V. & B. 54, 65; Bateman v. Hotckin, 10 B. 426.

is referred to Mr. Lewis's learned Treatise on Perpetuities. All that need be said here is, that in considering whether limitations or trusts offend against the rule (or are in legal language "too remote"), possible events are to be considered. If the trust may in any event be too remote, it will be void, notwithstanding that in the events which have actually happened it would have vested within the prescribed period. In short, to be good, the limitation must be one of which, at its creation, it could be predicted that it must necessarily vest within the prescribed period (f). It may also be mentioned, that if the vice of remoteness affect an unascertained number of members of a class, it affects the class as a whole. Thus, where a trust is for A. for life, and after her death for her children who may attain twenty-one, and the issue per stirpes of such of them as shall die under age, which issue shall attain twenty-one, the whole of the limitations after the life estate of A. are void. For although the children must attain twenty-one within the prescribed period, the issue of deceased children may not; and the gift being to a class as a whole, the one cannot be separated from the other (g). Where there is a valid trust, with a gift over in certain contingencies, which is void for remoteness, the valid trust remains un-

<sup>(</sup>f) Dungannon v. Smith, 12 Cl. & F. 546; Smith v. Smith, 5 Ch. App. 342; Re Handcock, 13 L. R. Ir. 34.
(q) Pearks v. Moseley, 5 App. Cas. 714.

affected (h). All remainders after a gift void for remoteness are themselves void (i).

5. The Thellusson Act.—At common law, the power of tying up money so as to accumulate at compound interest, was co-extensive with the period for which property might be tied up under the rule against perpetuities; viz., during any number of lives in being, and twenty-one years afterwards. The late Mr. Thellusson having, by his will, directed his personalty to be invested in land, and the rents of the land so bought and of his other real estate to be accumulated during the lives of all his descendants living at his death (k), the attention of Parliament was called to the unreasonable nature of such a power. Accordingly, by the statute 39 & 40 Geo. 3, c. 98 (commonly known as "The Thellusson Act"), the period allowed by the common law for accumulations was further restricted to the life or lives of the grantor or grantors, settlor or settlors; or (not and) twentyone years from the death of any grantor, settlor, devisor, or testator; or during the minorities of any persons who shall be living, or en ventre sa

<sup>(</sup>h) Goodier v. Johnson, 18 C. D. 441. For other recen examples of the question, whether or not a trust is void for remoteness, the reader is referred to Re Bevan, 34 C. D. 716, and Re Coppard, 35 C. D. 350.

<sup>(</sup>i) Cambridge v. Rouse, 8 Ves. 24, and see Watson v. Young, 28 C. D. 436, and Re Frost, Frost v. Frost, 43 C. D. 246. But where there are two alternative contingent gifts, one too remote and the other not, if the latter contingency happens the gift will be good, Evers v. Challis, 7 H. L. C. 531. But see note (q), p. 76, supra.
 (k) Thellusson v. Woodford, 11 Ves. 112.

mère, at the time of the death of the grantor, settlor, devisor, or testator; or during the minorities of any persons who, under the instrument directing the accumulation, would for the time being, if of full age, be entitled to the income directed to be accumulated. The statute, however, does not extend to any provision for payment of debts, or for raising portions for the children of the settlor, grantor, or devisor, or of any person taking any interest under the instrument directing such accumulations; nor to any direction as to the produce of timber upon any lands; nor to a trust or direction for keeping property in repair (l). might perhaps be thought that by analogy to the action of the courts with regard to trusts which transgress the common law period, a trust which endeavoured to go beyond the period allowed by the statute would be wholly void; but this is not so. The statute is merely prohibitory of accumulations going beyond the period prescribed by it, and being in derogation of a common law right, is construed strictly; consequently, as accumulations which exceed that period, but are within the common law period, are not contrary to public policy as defined by common law, such a trust is good pro tanto (m). If, however, the trust is to accumulate beyond the common law period, it is altogether void (n).

<sup>(</sup>l) Vine v. Raleigh, (1891) 2 Ch. 13; Re Mason, Mason v. Mason, (1891) 3 Ch. 467.

<sup>(</sup>m) See Griffiths v. Vere, Tud. L. C. Conv. 497, and cases there noted.

<sup>(</sup>n) Tud. L. C. Conv. 506, notes on Griffiths v. Vere, citing Boughton v. James, 1 Coll. 26, and other cases.

6. Settlements against policy of bankruptcy law. —A trust, with a proviso that the interest of the cestui que trust shall not be liable to the claims of creditors, is void so far as the proviso is concerned; and if it can be only ascertained that the cestui que trust was intended to take a vested interest, the mode in which, or the time when, he was to reap the benefit, is immaterial, and the entire interest may either be disposed of by the act of the cestui que trust, or may enure for the benefit of his creditors under the operation of the bankruptcy law (o). The question generally depends upon whether, on the decease of the cestui que trust, his executors would have a right to call upon the trustees retrospectively to account for the arrears (p). Of course, however, a trust to A. until he becomes bankrupt, or aliens the property, and then over to B., is good (q); but a man cannot make a settlement upon himself until bankruptcy, and then over (r), not even by an antenuptial marriage settlement (where it might fairly be urged to be part of the wife's terms of the marriage bargain); for the express object of such a

<sup>(</sup>o) Lew. 87. For example, see Younghusband v. Gisborne, 1 Coll. 400; Green v. Spicer, 1 R. & M. 395; Graves v. Dolphin, 1 Sim. 66; Piercy v. Roberts, 1 M. & K. 4; Snowdon v. Dales, 6 Sim. 524.

<sup>(</sup>p) See Re Saunderson's Trusts, 3 K. & J. 497.

<sup>(</sup>q) See Billson v. Crofts, 15 Eq. 314; Re Alwyn's Trusts, 16 Eq. 585, and cases therein cited.

<sup>(</sup>r) Knight v. Brown, 7 Jur., N. S. 894; Brooker v. Pearson, 37 Beav. 181; Re Pearson, 3 C. D. 807.

trust is to cheat his creditors, which is, of course, an illegal purpose, and therefore void (s).

- 7. Restraint on alienation.—Trusts framed with the object of preventing the barring of entails or imposing restrictions on alienation of property, are contrary to the policy of the law, and are therefore void (t); with the single exception that trusts limiting the power of married women to alienate their separate property during coverture, are regarded as valid.
- 8. Trusts for future illegitimate children. Where a man, by deed, creates a trust in favour of future illegitimate children (putting aside the objection as to want of certainty in the cestuis que trusts). the trust will be void, as being contrary to public policy, and conducive to immorality (u). Similarly, a trust by will in favour of the future illegitimate children of another, would clearly be a direct encouragement to such other to continue his illicit intercourse after the testator's death, and would be therefore void (x).

<sup>(</sup>s) Higginbottom v. Holme, 19 V. 88; Ex parte Hodgson, ib. 208; Re Pearson, 3 C. D. 807; but consider Re Detmold, 40 C. D. 585.

<sup>(</sup>t) Floyer v. Bankes, 8 Eq. 115; Sykes v. Sykes, 13 Eq. 56; and as to alienation, Snowdon v. Dales, 6 Sim. 524; Green v. Spicer, 1 B. & M. 395; Graves v. Dolphin, 1 Sim. 66; Brandon v. Robinson, 18 Ves. 429; Ware v. Cann, 10 B. & C. 433; Hood v. Oglander, 34 B. 513.

<sup>(</sup>n) Bladwell v. Edwards, Cro. Eliz. 509; Moo. 430; and see per Mellish, L. J., in Occleston v. Fullalove, 9 Ch. Ap. 147; and Thompson v. Thomas, 27 L. R. Ir. 457.
(x) Metham v. Duke of Devon, 1 P. W. 529; Dorin v.

Dorin, L. R., 7 H. L. 568; Re Byles, 1 C. D. 282.

The same objection does not, however, apply to the case of a testator creating a trust by will in favour of his own future bastards. Thus, in Occleston v. Fullalore (y), a testator by his will gave a share of the proceeds of his residuary estate to his reputed children, Catherine and Edith, "and all other children which I may have, or be reputed to have, by the said M. L., now born, or hereafter to be born." This gift in favour of future-born children was held valid: and Lord Justice James said: "If there be any inducement to wrong, the law can and does deal with it. If there be a covenant for a turpis causa, the covenant is void. If there be an illicit condition, precedent or subsequent, to a gift, it either avoids the gift or becomes itself void. If the gift requires or implies the continuation of wrongdoing, that is in substance a condition of the gift, and falls within the rule of the condition. But how can that apply to an instrument like a will, with reference to gifts taking effect at the death in favour of persons then in existence?" And Lord Justice Mellish said: "In the present case, the will being the will of the putative father himself, it is impossible that it can encourage an immoral intercourse after his death. If the bequest is to be held to be contrary to public policy, it must be because it tended to promote an immoral intercourse in his lifetime. There was no evidence that M. L. knew that the will was made; and if

<sup>(</sup>y) 9 Ch. Ap. 147; and see also Re Goodwin, 17 Eq. 345.

she did know it, she must also have known that it could be revoked at any moment. Then, can it be said that the testator himself would be encouraged in immorality by having the power to make a will in favour of his future children. I cannot see that he would; or, at any rate, I think that this is too uncertain to be made a ground of decision. I am of opinion that a will no more comes into operation, for the purpose of promoting immorality or for effecting something contrary to public policy, during a testator's lifetime, than it does for any other purpose."

9. Separation deeds.—A trust to take effect upon the future separation of a husband and wife is void, as being contrary to public morals (z); but a trust in reference to an immediate separation, already agreed upon, is good and enforceable (a). If, however, the separation does not in fact take place, the trust becomes wholly void (b). The reason of all this is at once obvious, when we consider that a provision for husband or wife, to take effect upon a future separation, is a direct encouragement to misconduct which may eventuate in a separation; whereas, when a separation is actually agreed on

<sup>(</sup>z) Westmeath v. Westmeath, 1 Dow., N. S. 519; Proctor v. Robinson, 35 B., and on Ap. 15 W. R. 138; and see also Trafford v. Machonochie, 39 C. D. 116, where a testator gave an annuity to A. so long as she might reside apart from her husband.

<sup>(</sup>a) Wilson v. Wilson, 1 H. L. Cas. 538; 5 H. L. Cas. 40; Vansittart v. Vansittart, 2 D. & J. 249; Jodrell v. Jodrell, 9 B. 45; and see 14 B. 397.

<sup>(</sup>b) Bindley v. Mulloney, 7 Eq. 343.

—when both parties have decided that they will no longer remain together—there can be no encouragement to marital misconduct in agreeing to the distribution of their income in a particular manner and for their mutual benefit and advantage.

10. Trusts in general restraint of marriage. Where property is settled in trust for a woman until she marry a man with an income of not less than 500l. a-year (c), or until she marry any person of a particular trade (d), and then over in trust for another, the latter trust is bad, as its object, as gathered from its probable result (e), is to restrain marriage altogether. If, however, the trust over is to take effect only upon the first beneficiary marrying a particular person, it would be good, as it would not be in general restraint of marriage (f).

11. Restraint on second marriage.—So, where (a)a person, by her will, gave her residuary estate to trustees, upon trust to pay the income to her nephew and his wife (the testatrix's niece) for their joint lives and the life of the survivor, with a gift over (in the event of the nephew surviving and marrying again) in trust for the children of her said niece, and in default of such children, for

<sup>(</sup>c) Sm. R. & P. Prop. 80; Story, 280—283.

<sup>(</sup>d) Ibid. (e) Sm. R. & P. Prop. 80; and Story, 274-283; Lloyd v. Lloyd, 2 Sim. N. S. 255.

<sup>(</sup>f) Sm. R. & P. Prop. 81—107. (g) Allen v. Jackson, 1 C. D. 399.

the children of the testatrix's sister, it was held that the gift over was good. Mellish, L. J., in delivering his judgment, said: "It has been said with respect to this rule against restraint of marriage, that it has no foundation on any principle, that it has nothing to do with public policy, but that it is a positive rule of law, adopted nobody can tell why; and that, because it is a positive rule of law, adopted nobody can tell for what reason, and without any regard to public policy, therefore it is impossible to make an exception to it, and that the court can do nothing with it but carry it out. I cannot agree with that. It may be, no doubt, that in these modern times we should not for the first time establish such a rule of public policy; but of course if a rule has been established as a rule of law, because it was thought agreeable to public policy and to the interests of the nation at the time it was established, it may be that the court cannot alter it because circumstances have altered. . . . If then there was such a rule of public policy, we are to consider how does that rule apply to second marriages? It has never been decided that it applies to second marriages. . . . It appears to me very obvious that, if it is regarded as a matter of policy, there may be very essential distinctions between a first and a second marriage. At any rate there is this, that in the case of a second marriage, whether of a man or a woman, the person who makes the gift may have been influenced by his friendship towards the wife in the one case, and towards the

husband in the other case. That is to say, regarding the case of some member of the husband's family, he may make a gift to the husband for life, and then make a gift to the wife because she is the wife of that particular husband, and because he thinks it is more for the benefit of the children that the wife should have the money while the children are young, rather than that the children should have it."

12. Capricious Trusts benefiting no one.-Where property is given upon trust to do certain things obviously for the benefit of no one, the trust is, as a rule, void. Thus, where a testatrix devised a house to trustees in fee, upon trust to block up all the rooms (except four, in which she directed that a housekeeper and his wife should live) for twenty years, and subject thereto upon trust for A. in fee; it was held that the trust for sealing up the house for twenty years was void, and that the house was undisposed of by the will for the term of twenty years from the testatrix's death (h).

13. Trusts to raise and keep in repair tombs.— Although it would seem that the court could not enforce a trust for applying money in the erection of a tomb or monument, inasmuch as there would be no cestui que trust who could set the court in motion, it has been said that such trusts are not illegal, and that trustees may safely spend the money on the prescribed object if they please (i).

(h) Brown v. Burdett, 21 C. D. 667.

<sup>(</sup>i) Per North, J., Re Dean, Cooper-Dean v. Stevens, 41 C. D. at p. 557.

The same judge added, that he knew of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it for the repair of such a monument, if he took care to limit the time for which the trust was to last, so as to provide for its cesser within the limits fixed by the rule against perpetuities. Where, however, a testator creates a trust for the repair of tombs or monuments, without limiting its continuance in accordance with such rule, it will be absolutely void for remoteness (k). On the other hand, a similar indefinite trust for keeping a church or churchvard in repair, would be valid, as it would be considered a charitable trust in favour of the congregation of the church, and the rule against perpetuities does not apply to charitable trusts (1). It has also been recently decided, that a testator may make a gift to a charity conditionally upon their keeping his tomb in repair, with a gift over to another charity in the event of the tomb being allowed to fall into disrepair (m).

14. Trusts for the benefit of dogs, horses, &c.—
On the same principles a trust, limited in point of time within the rule against perpetuities, to apply money for keeping specified pet animals in comfort during their lives, is perfectly legal, although no person could enforce it (n). Moreover, dogs and

<sup>(</sup>k) Re Vaughan, Vaughan v. Thomas, 33 C. D. 187.
(l) Re Vaughan, Vaughan v. Thomas, supra; Hoare v. Osborne, 1 Eq. 585; Re Rigley, 1 W. R. 342.

<sup>(</sup>m) Re Tyler, Tyler v. Tyler, (1891) 3 Ch. 252. (n) Re Dean, Cooper-Dean v. Stevens, supra; and Mitford v. Reynolds, 16 Sim. 105.

horses are considered so useful to man, that it is settled that a charitable trust of undefined continuance may be established in their favour (o).

### Art. 11.—Necessity or otherwise of Writing and Signature.

(1.) A declared trust in relation to land, or to an interest in land, is not valid, unless it is either created by will, or evidenced by some writing, signed by the settlor, showing clearly what the intended trust is, or referring to some other document which does so (p). The rule does not apply, however, where it would operate so as to effectuate a fraud (q). Where the legal estate is vested in a trustee for an absolute beneficial owner, the latter

<sup>(</sup>o) Per North, J., Re Dean, Cooper-Dean v. Stevens, supra, at p. 557; and see Armstrong v. Reeves, 25 L. R. Ir. 325.

<sup>(</sup>p) Statute of Frauds, 29 Car. 2, c. 3, s. 7. Land includes not only freehold but also copyhold (Withers v. Withers, Amb. 152) and leasehold hereditaments (Foster v. Hale, 3 V. 696).

<sup>(</sup>q) See per Lord Westbury in M<sup>\*</sup>Cormick v. Grogan, 4 H. L. 82; Strickland v. Aldridge, 9 V. 219; Haigh v. Kaye, 7 Ch. Ap. 469.

, le bent il de ei or well. him is the proper party to declare the trust(r).

(2.) A declared trust of property other than land (not intended to be testamentary) may be made verbally (s).

(3.) A declared trust of any kind of property, if intended to be testamentary, must be created by a duly executed and attested will or codicil (t).

(4.) In the absence of fraud, a person who appears on the face of a will to be a beneficial devisee or legatee, cannot be subsequently converted into a trustee by a declaration of the testator not executed as a will or codicil; nor where property is devised or bequeathed to a person as trustee can the trust be declared by a subsequent instrument other than a will or codicil(u). But in that case there is a resulting trust in favour of the testator's heir or next of kin.

<sup>(</sup>r) Kronheim v. Johnson, 7 C. D. 60; Tierney v. Wood,

 <sup>19</sup> B. 330; Rudkin v. Dolman, 35 L. T. 791.
 (s) McFadden v. Jenkins, 1 Ph. 157; Hawkins v. Gardner, 2 Sm. & G. 451; Benbow v. Townsend, 1 M. & K. 506; Middleton v. Pollock, 4 C. D. 49. (t) 1 Vict. c. 26, s. 9, and Stat. Frauds, s. 5.

<sup>(</sup>u) Addlington v. Cann, 3 Atk. 141; Briggs v. Penny, 3 De G. & S. 547; Re Boyes, Boyes v. Carritt, 26 C. D. 531; Habergham v. Vincent, 2 Ves. jun. 230.

ILLUST.—1. Trust evidenced by letters.—In Foster v. Hale (x), a gentleman named Burdon had a share in a colliery, and the suit was commenced for the purpose of fixing a trust upon his share for the benefit of his partners in a bank, in which he was also concerned. Lord Alvanley, after commenting upon the conduct of the plaintiffs, said: "But it is insisted that, though their names do not appear upon the lease, nor that they publicly, even by inquiry, ever busied themselves about the colliery, yet, in fact, an agreement took place that he (Burdon) should be a trustee, as to his share for them (the plaintiffs) and himself, in equal shares. They say they can make it out satisfactorily to the court and within the Statute of Frauds, and that, not by any formal declaration of trust, but by letters under his (Burdon's) hand, and signed by him, in which they allege he admitted himself such trustee, and that, under the true meaning of the statute, it is sufficient if it appears in writing under the hand of a person having a right to declare himself a trustee, and that is a formal declaration of trust. It was contended for the defendants that there is great danger in taking a declaration of trust arising from letters loosely speaking of trusts, which might or might not be actually and definitely settled between the parties with such expressions as 'our,' 'your,' &c., intimating some intention of a trust; that upon such grounds the court may be called upon to

<sup>(</sup>x) 3 V. 696.

execute a trust in a manner very different from that intended, and that it is absolutely necessary that it should be clear from the declaration what the trust is. That I certainly admit. The question, therefore, is, whether sufficient appears to prove that Burdon did admit and acknowledge himself a trustee, and whether the terms and conditions on which he was a trustee sufficiently appear. I do not admit that it is absolutely necessary that he should have been a trustee from the first. It is not required by the statute that a trust should be created by a writing . . . . but that it shall be manifested and proved by writing; plainly meaning that there should be evidence in writing, proving that there was such a trust. Therefore, unquestionably it is not necessarily to be created in writing, but it must be evidenced by writing, and then the statute is complied with. I admit that it must be proved in toto not only that there was a gift, but what that gift was."

2. Trust not sufficiently evidenced.—In Smith v. Matthews (y) the husband of one Mrs. Matthews, being a person of dissolute habits, got into difficulties. Thereupon, one Clark, the brother of Mrs. Matthews, entered into an arrangement with Matthews, whereby the latter conveyed to him certain real property and a certain business, in consideration of his undertaking to pay off all his (Matthews') debts. Clark entered into possession,

<sup>(</sup>y) 3 De G. F. & J. 139.

and carried on the business for the benefit of his sister and her children. There was no explicit and formal declaration of trust by Clark, but, from several letters, it appeared that Clark considered that he held the property "for the benefit of Mrs. Matthews and her family"; and by a memorandum given to the mortgagee, upon paying off the mortgage on the property, it was expressly stated that the title deeds had been handed over to Clark "as the trustee of the real and personal estate of Mrs. Matthews." Clark having died intestate, the lands descended at law to Mrs. Matthews as his heir-at-law, and thereupon her husband tried to get possession of them jure mariti. In order to resist this attempt, it was contended that Clark had constituted himself a trustee for Mrs. Matthews and her children, and that the property therefore devolved, burdened with the trust. Lord Justice Turner, however, held that the trust was not expressed with sufficient certainty in any of the documents; and said: "It must be manifested and proved by writing, signed as required, what the trust is; . . . . the main reliance was placed on the memorandum; . . . but I think it by no means improbable that, in speaking of himself as trustee in that memorandum, Clark may have meant no more than that he considered himself a trustee with reference to the duty which he had undertaken for the payment of Matthews' debts; and at all events the memorandum does not show what was the trust to which it refers, and I think, therefore, that no

trust in favour of Mrs. Matthews can be founded upon it."

- 3. Verbal trust of stock.—In Kilpin v. Kilpin (z), a person transferred stock into the name of an illegitimate daughter and her husband and their two eldest children, and by parol declaration, confirmed by an unsigned entry in a memorandum book, declared that such investments were to be for the benefit of all his daughter's children. Held, a good declaration of trust, as the stock was merely personalty.
- 4. Request to debtor to hold debt in trust.—So in McFadden v. Jenkins (a), a creditor desired his debtor to hold the debt in trust for A. The debtor acquiesced, and paid over part of the money to A.; and it was held that the creditor had made a valid declaration of trust, and had constituted the debtor a trustee of the debt for A.
- 5. Verbal testamentary trust, void.—But where the trust is testamentary, that is to say, only intended to operate after death, the trust must, in the absence of fraud, be contained in a duly executed or attested will or codicil. Thus, in the recent case of Re Boyes, Boyes v. Carritt (b), a testator, who died in 1882, made a will devising and bequeathing all his property to the defendant Carritt, and appointing him sole executor. Mr. Carritt, who was the solicitor of the testator and

<sup>(</sup>z) 1 M. & K. 521.

<sup>(</sup>a) 1 Ph. 153. (b) 26 C. D. 531; and see also Vincent v. Vincent, 35 W. Ŕ. 7.

drew the will, gave evidence to the effect that the intention of the testator was that he should hold the property as trustee for objects of the testator's bounty, who were to be afterwards indicated by him. No direction, however, on the subject was given by the testator in his lifetime, but after his death two letters were found, written by him to Mr. Carritt, and sealed up, in both of which he expressed a desire that Mr. Carritt should have 251, to buy a trinket in memory of him, and that all the rest of the property should go to a lady named Brown. That lady gave confirmatory evidence, stating that the testator told her that he had written the two letters; and that he had written two for further security in case one should be lost: that he also informed her where the letters were, and directed her, in case of his death, to forward them to Mr. Carritt, which she did. Under these circumstances, it being clear that Mr. Carritt was a trustee, the question was whether the trust for the lady, Mrs. Brown, was valid and effectual, or whether he was a constructive trustee for the next of kin. Mr. Justice Kay, after examining the authorities, came to the conclusion that, as the law stood, if a trust was not declared by a testator when his will was made, then, in order to make the trust binding, it was essential that it should be communicated to the devisee or legatee in the testator's lifetime, and that he should accept that particular trust. A devisee or legatee could not, by accepting an indefinite trust of this kind,

enable a testator to make an unattested codicil. His lordship regretted that the trust should fail, but he was bound to declare, Mr. Carritt having admitted himself to be a trustee, that the trust was for the next of kin. The reader must, in reading this case, bear in mind that Mr. Carritt admitted that he knew, when he prepared the will, that he was not meant to take beneficially, and therefore, of course, it would have been personal fraud on his part if he had claimed to do so. If, however, he had not known the non-beneficial nature of the bequest, the subsequent letters of the testator would not have been sufficient to have deprived Mr. Carritt of the beneficial interest, and consequently neither Mrs. Brown nor the next of kin would have taken anything. Whether, however, Mr. Carritt had or had not known, when the will was made, that he was only intended to take as trustee, yet, if the testator had subsequently communicated to him that he was not to take beneficially, and had either declared specific trusts of the property, or had simply said that he had not yet made up his mind upon what trusts it should be held, and if Mr. Carritt had expressly assented to act as trustee, then, as his assent would have operated to induce the testator not to alter his will, Mr. Carritt would have been bound to take the property as trustee simply, and to carry out the testator's intention, as in illustration 7.

6. A testator gave his residuary real and personal estate upon trust for sale, and upon further

trust to pay the proceeds to his friends A. and B. in equal shares. And he declared that he bequeathed such proceeds "to the said A. and B., their executors, administrators and assigns, absolutely, in the full confidence that they would carry out his wishes in respect thereof." A. and B. survived the testator, but died before the distribution of the estate. On these facts, it was held by Chitty, J., that parol evidence was inadmissible that the testator had communicated his wishes verbally to one of the two legatees, and that as (apart from such evidence) the precatory words were not sufficient to create a trust, A. and B. took the proceeds of the residue absolutely (c).

7. Fraud an exception to rule.—But where a father is induced not to make a will by statements of his heir presumptive that the latter would make suitable provision for his immediate relatives, the court considers that that is a fraud, and, notwithstanding the statute, will oblige the heir to make a provision in conformity with his implied obligation (d). For (as was said by Lord Westbury, in McCormick v. Grogan (e)), "the court has, from a very early period, decided, that even an act of parliament shall not be used as an instrument of

(e) 4 H. L. 82.

<sup>(</sup>c) Re Downing, 60 L. T. 140; and see also Re King, 21 L. R. Ir. 273.

<sup>(</sup>d) Sellack v. Harris, 5 Vin. Ab. 521; Strickland v. Aldridge, 9 V. 219.

fraud; and if in the machinery of effectuating a fraud an act of parliament intervenes, a court of equity does not, it is true, set aside the act of parliament, but it fastens upon the individual who gets a title under that act, and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way a court of equity has dealt with the Statute of Frauds, and in this manner also it deals with the Statute of Wills. And if an individual on his death-bed, or at any other time, is persuaded by his heir-at-law or next of kin to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but at the same time says to that individual that he has a purpose to answer which he has not expressed in the will, but which he depends upon the disponee to carry into effect, and the disponee assents to it (either expressly or by any mode of action which the disponee knows must give to the testator the impression and belief that he fully assents to the request), then undoubtedly the heir-at-law in one case, and the disponee in the other, will be converted into trustees; simply on the principle that an individual shall not be benefited by his own personal fraud."

8. And on similar grounds, where the plaintiff had assigned to the defendant an agreement for a lease, in form absolutely, but there appeared to have been a parol collateral arrangement that the defendant should hold part of the premises in trust for the plaintiff, it was held that such a trust could be proved by parol evidence; for (assuming the arrangement to have been in fact made) to exclude parol evidence would operate to effectuate a fraud (f).

<sup>(</sup>f) Booth v. Turle, 16 Eq. 182.

#### CHAPTER III.

## Validity of Declared Trusts in relation to Latent Matters.

- ART. 12. Who may be a Settlor.
  - ,, 13. Who may be a Beneficiary.
  - ,, 14. When voidable for failure of Consideration,
    Mistake or Fraud.
  - ,, 15. When voidable by Settlor's Creditors under 13 Eliz. c. 5.
  - ,, 16. When voidable under Bankruptcy Act.
  - ,, 17. When void as against subsequent Purchasers from Settlor.

### Art. 12.—Who may be a Settlor.

Every person who can hold and dispose of any legal or equitable (a) estate or interest in property may create a trust in respect of it.

ILLUST.—1. Infants.—Practically speaking, an infant cannot now effectually dispose of property so as to bind himself; and, therefore, cannot, except under the statute next mentioned, make an irrevocable settlement. However, males over the

<sup>(</sup>a) Gilbert v. Overton, 2 H. & M. 110; Kekewich v. Manning, 1 Hare, 464; Donaldson v. Donaldson, Kay, 711.

age of twenty, and females over the age of seventeen years can now, upon marriage or afterwards (b), with the approbation of the High Court (acting in pursuance of the power given to it by the statute 18 & 19 Vict. c. 43, explained by 23 & 24 Vict. c. 83), make binding settlements of real and personal estate belonging to them in possession, reversion, remainder or expectancy. This act, however, has only removed the disability of infancy, leaving unaffected other disabilities (if any), such as lunacy or coverture. In fact, under it, a married female infant may do all that an adult married woman could do, and no more (c). Consequently, in a case where a female infant was entitled to a reversionary interest in personal estate, under a settlement executed prior to Malins' Act (d), she could not, before 1883, settle the reversion under the Infants' Settlement Act so as effectually to bind her. For Malins' Act did not apply, and without its assistance, women married before 1883 cannot alienate reversionary interests in personal estate not settled to their separate use (c).

2. Married Women. - Women married since the 31st of December, 1882, are in the same position with regard to property as spinsters (e). They can, therefore, create trusts in relation to it, either

<sup>(</sup>b) Re Phillips, 34 C. D. 467; Re Sampson and Wall, 25 ib. 482.

<sup>(</sup>c) Buckmaster v. Buckmaster, 35 C. D. 21.
(d) 20 & 21 Vict. c. 57.
(e) Married Women's Property Act, 1882.

by act inter vivos, or by testamentary disposition. Women married prior to that date are in the same position with regard to any property as to which their title first accrued (whether as a possessory or a reversionary title (f)) since the 31st December, 1882. With regard to other married women, they can only alienate (and therefore can only create trusts) in the following cases, viz.:-(1) where they are donees of a power of appointment (q); (2) where the property is settled to their separate use (h) without restraint on anticipation; (3) where the property is their separate property under the repealed Married Women's Property Act of 1870; (4) where the property is real estate, and their husbands join in an acknowledged deed; (5) where the property is reversionary personalty, their title to which is derived under an instrument (other than their marriage settlement) executed after the 31st of December, 1857, and their husbands join in an acknowledged deed (i).

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3. Corporations.—Prior to 5 & 6 Will. 4, c. 76, municipal corporations were able to create trusts of their property (i); but since that act, corporations included in the schedule to it are themselves made trustees of their property for public

<sup>(</sup>f) Married Women's Property Act, 1882; and see Reid v. Reid, 31 C. D. 402. But as to when a title does first accrue, conf. Re Parsons, Stockley v. Parsons, 62 L. T. 929.

(g) Burnett v. Mann, 1 Ves. 156.

(h) Taylor v. Meads, 34 L. J., Ch. 203.

<sup>(</sup>i) 20 & 21 Vict. c. 57.

<sup>(</sup>i) Colchester v. Lowton, 1 V. & B. 226.

purposes, and consequently cannot create trusts of it (k).

- 4. Lunatics.—It is clear that a lunatic cannot create either a testamentary trust, or a trust inter vivos in favour of volunteers (1). On the other hand, where a person who is a lunatic in fact, but is not known to be so to persons privy to valuable consideration, executes a settlement for valuable consideration, it would seem that the settlement would not be set aside, either at law or in equity (m). It must, however, be borne in mind that a lunatic is incapable of contracting a valid marriage, and that, consequently, a settlement executed by a lunatic in consideration of an intended marriage could not be said to be a settlement based on value. I am not aware of any case where the point has arisen; but if it did arise, it might well be argued (at all events on behalf of a woman who had gone through the ceremony of marriage with a lunatic without knowledge of his incapacity) that it would be inequitable for the court to set aside the settlement, as the innocent beneficiary could not be replaced in her former position.
- 5. Convicts.—A convict (i.e., one sentenced to death or penal servitude for treason or felony (n))

<sup>(</sup>k) 5 & 6 Will. 4, c. 76, s. 94; Att.-Gen. v. Aspinal, 2 M. & C. 613.

<sup>(1)</sup> See Neil v. Morley, 9 Ves. 478.

<sup>(</sup>m) See Molton v. Camroux, 2 Exch. 487, 503; aff. 4 Exch. 17; and Price v. Berrington, 3 M. & G. 486; Neill v. Morley, 9 Ves. 478.

<sup>(</sup>n) 33 & 34 Vict. c. 23, s. 6.

is incapable, until the expiration of his sentence, or until his death (o), of alienating or charging his property; and therefore he is incapable of declaring a trust of it, at all events by act inter vivos. This incapacity, however, is suspended for any period during which the convict may be at large under a ticket of leave (p).

6. Aliens.—By the statute 33 Vict. c. 14, aliens are placed in the same position as natural-born subjects with regard to the acquisition and alienation of property. As, however, the act is not retrospective, it would seem that aliens who acquired lands by devolution before the act are not protected, and might still be dispossessed by the crown (q).

#### Art. 13.—Who may be Beneficiaries.

(1) Every person who is capable of holding property may lawfully be a beneficiary of it under a trust(r).

(2) A trust (which is not a charitable trust (s) ) to perform certain duties which are of no benefit to any human

<sup>(</sup>o) Ib. ss. 7 and 8. Quere, whether this act would prevent a convict making a valid will.

<sup>(</sup>p) Ib. s. 30.
(q) See Sharpe v. St. Saveur, 7 Ch. App. 351; Calvin's case, 7 Rep. 49.

<sup>(</sup>r) Lewin, 40.
(s) Trusts may be charitable, although not directly benefiting human beings; ex. gr., trusts for providing a home for lost dogs, trusts for the protection of animals

being, is (semble) not enforceable (t), although it may be valid if the trustee desires to perform it, unless it transgresses the rule against perpetuities (u). If the trustee does not perform it there is a resulting trust of the unapplied property.

ILLUST.—1. Corporations.—A corporation cannot be cestui que trust of lands without licence under the Mortmain Acts; for without such licence it cannot hold lands, and therefore cannot take through the medium of a trust.

2. Aliens.—Similarly, before the act 33 Vict. c. 14, an alien, as he could hold property against everyone except the crown, could also be a beneficiary of land as against everyone except the crown (v). But as he could not take a legal estate by operation of law, so likewise he could not be a beneficiary by act of law (x). As the above act is not retrospective, it would seem that aliens who acquired lands anterior to the passing

liable to vivisection, Re Douglas, Obert v. Barron, 35 C. D. 472; and trusts for repairing a church or church-yard, Re Vaughan, Vaughan v. Thomas, 33 C. D. 187.

<sup>(</sup>t) Rickard v. Robson, 31 B. 244; Lloyd v. Lloyd, 2 Sim., N. S. 255; Thompson v. Shakespeare, Johns. 612; Fowler v. Fowler, 33 B. 616; Fisk v. Att.-Gen., 4 Eq. 521; Hunter v. Bullock, 14 Eq. 45; Dawson v. Small, 14 Eq. 104; and per North, J., in Re Dean, 41 C. D. 556; and see pp. 89—91, supra.

<sup>(</sup>u) Re Dean, ubi supra, at p. 557.

<sup>(</sup>v) Barrow v. Wadkin, 24 B. 1; Ritson v. Stordy, 3 Sm. & Giff. 230; Sharpe v. St. Saveur, 7 Ch. 351.
(x) Calvin's case, 7 Rep. 49.

of the act, are not protected by it, and that the crown is entitled to all lands of which they are beneficiaries (y).

3. Married women.—Although, by recent legislation, married women are as capable of holding property as other people, they were not, previously to 1883, in so favourable a position. At common law, the husband was entitled to all his wife's personal chattels in possession; to the rents and profits of her freeholds during their joint lives; to all her choses in action which he should reduce into possession during the marriage; and to all her leaseholds. But if he did not reduce the choses in action into possession, or dispose of the leaseholds during the marriage, they reverted to the wife if she survived him. Courts of equity. however, in this instance, did not follow the law. but invented that peculiar equitable estate known as a "separate use." Property, therefore, which is settled in trust for a woman for her separate use, is freed from the jus mariti; and with regard to it a married woman is regarded as a feme sole. She may dispose of it without her husband's consent, either by act inter vivos, or by will (z), unless she be by the trust restrained from anticipation. In the latter case she cannot dispose of it at all without the sanction of the Court, which may, however, be obtained where it is clearly for her interest, on summons under sect. 39 of the Conveyancing and Law of Property Act, 1881.

<sup>(</sup>y) Sharpe v. St. Saveur, supra.
(z) Peacock v. Monk, 2 Ves. sen. 190; Taylor v. Meads, 34 L. J., Ch. 203.

ART. 14.—When voidable for failure of consideration, mistake or fraud.

The Court will cancel a trust at the suit of the settlor or his representatives (a), if :---

- a. The very object with which the trust was created has ceased to exist(b); or
- β. The settlement was executed in ignorance or mistake as to its effect (c); or
- γ. Fraud or undue influence has been exercised to induce the settlor to create the trust (d);

Provided the settlor has not (in the two latter cases) acquiesced in or acted upon the settlement after the influence has ceased, or after he has become aware of the legal effect of

(d) Osmond v. Fitzroy, 3 P. W. 129; Huguenin v. Baseley, 14 V. 273; Dent v. Bennett, 4 M. & C. 277; Hoghton v. Hoghton, 15 B. 299; Cooke v. Lamotte, 15 B.

234.

<sup>(</sup>a) Anderson v. Elsworth, 3 Giff. 154; Tyars v. Alsop, 37 W. R. 339; Morley v. Loughnan, (1893) 1 Ch. 736. (b) See Essery v. Cowland, 26 C. D. 191; Bond v. Walford, 32 C. D. 238.

<sup>(</sup>c) Phillips v. Mullings, 7 Ch. App. 244; Fanshawe v. Welsby, 30 B. 343; and see as to mistake where a provision for daughters was omitted by the engrossing clerk, Re Daniell, 1 C. D. 375; and see Clarke v. Girdwood, 7 C. D. 9.

it (e); and that the status of the parties has not been irrevocably altered as part of the transaction (f).

As stated in Article 8 (supra), where a trust has once been perfected or declared, and does not rest in fieri, the court will enforce it against the settlor and his representatives, notwithstanding that it may have been entirely voluntary on his part. But although that is so, a trust, like a contract, will be cancelled in Equity for fraud, mistake, or total failure of the object for which it was created.

For some years, indeed until quite recently, it was considered that, where a trust was voluntary, and the settlor invoked the aid of the court to set it aside, the onus was immediately east on the beneficiaries of showing that all the provisions of the settlement were proper and usual, or, that if there were any unusual provisions, they were brought to the knowledge of, and were understood by, the settlor (g); and in particular, the absence of a power of revocation was considered to be fatal unless it could be conclusively shown that the settlor had been advised to insert one, and had deliberately elected not to do so (h). This view was, however, dissented from by the Court of

<sup>(</sup>e) Davies v. Davies, 9 Eq. 468, and cases cited; Allcard v. Skinner, 36 C. D. 145.

<sup>(</sup>f) Johnston v. Johnston, 52 L. T. 76.(g) Phillips v. Mullings, supra.

<sup>(</sup>h) Coutts v. Acworth, 8 Eq. 558; Wollaston v. Tribe, 9 Eq. 44; Everitt v. Everitt, 10 Eq. 405.

Appeal in Hall v. Hall (i), and by the late Sir George Jessel, M. R., in Dutton v. Thompson (k), and appears to be no longer law. In the latter case the late M. R. said: "I emphatically disagree with the ground on which some judges have set aside voluntary settlements, namely, that there were provisions in them which were not proper to be inserted in such settlements. It is not the province of a Court of Justice to decide on what terms or conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a Court of Justice to set aside a settlement which he chooses to execute, on the ground that it contains clauses which are not proper. No doubt if the settlement were shown to contain provisions so absurd and improvident that no reasonable person would have consented to them, or if provisions were omitted that no reasonable persons would have allowed to be omitted, that is an argument that he did not understand the settlement. But in no other way would it be a reason for setting it aside." This case, coupled with Hall v. Hall (1), Phillips v. Mullings (m), and Henry v. Armstrong (n), must be taken to have definitely overruled the previous decisions in Coutts

<sup>(</sup>i) 8 Ch. App. 430. (k) 23 C. D. 278.

<sup>(</sup>l) 8 Ch. App. 430.

<sup>(</sup>n) 7 Ch. App. 244. (n) 18 C. D. 668, infra, p. 117.

v. Accorth (o), Wollaston v. Tribe (o), and Everitt v. Everitt (o), and to have left the onus of showing mistake, fraud, or undue influence upon the settlor in all cases, except those in which the provisions of the settlement are so absurd as to raise a presumption that no sane person would have agreed to them knowingly, and except cases in which the beneficiary occupied at the date of the settlement a fiduciary position towards the settlor, in which latter there is a strong primâ facie presumption of undue influence which casts the onus of supporting the settlement on the beneficiary (p).

Illust.—1. Total failure of consideration.—In the recent case of Essery v. Cowlard (q), by a settlement executed in 1877, in consideration of a then intended marriage, it was declared that a sum of stock, which had been transferred by the intended wife to trustees, should be held by them on trust for her benefit and that of the intended husband, and the issue of the intended marriage. The marriage was not solemnized, but the parties cohabited without marriage, and three children were born. In 1883 an action was brought by the father and mother of these children against the trustees to have it set aside; and it was held that the contract to marry having been absolutely

(o) Ubi supra.

(q) 26 C. D. 191.

<sup>(</sup>p) Huguenin v. Baseley, 14 V. 273; Hylton v. Hylton, 2 V. 547; Hunter v. Alkins, 3 M. & K. 113; Tate v. Williamson, 2 Ch. App. 55; Allcard v. Skinner, 36 C. D. 145; Morley v. Loughnan, (1893) 1 Ch. 736; and see Illustrations, infra.

put an end to, the court could cancel the settlement. A similar decision was arrived at in the more recent case of *Bond* v. *Walford* (r), where an intended marriage had been simply broken off.

2. Mistake.—Although a voluntary trust will not be set aside or varied for the mere asking, yet where the settlor can show that he misunderstood the effect of it, relief will be given to him. In the recent case of James v. Couchman (s), it appeared that the plaintiff had, by a voluntary settlement (made with the object of protecting himself against extravagant habits), assigned property to trustees, upon trust for himself for life, remainder to his wife (if any) for life, remainder to his issue, and in default of issue to his paternal next of kin. Mr. Justice North, while refusing to set aside the settlement, thought that the ultimate limitation was unusual, and that the settlor's attention was not called to it, and that he did not understand the effect of it; and accordingly his Lordship ordered the settlement to be rectified so as to give the settlor a power of appointment in default or failure of issue. His Lordship, however, was careful to add: "The fact that a usual power was omitted here would not weigh with me in the least, if I were satisfied that the omission of such a power had been brought to the attention of the settlor, as he would then have been competent to judge for himself; but it seems to me

<sup>(</sup>r) 32 C. D. 238. (s) 29 C. D. 212.

that in the present case his attention was not called to it."

- 3. Where a person, apparently at the point of death, executed a voluntary settlement, of which he recollected nothing, which was never read to him, and in which a power of revocation was purposely omitted by the solicitor, on the ground that he knew the variable character of the settlor, and there was also evidence that the settlor thought that he was executing the settlement in place of a will, it was held that the settlement was revocable (t).
- 4. Even where there is valuable consideration given, but the settlor is infirm and ignorant, and there is reason to suppose that he did not fully understand the transaction, it will be set aside, unless it be proved that full value was given (u).
- 5. Fraud.—Where a settler has been induced by fraud to make a settlement (whether voluntary or based upon value), it will not be enforced; as, for instance, where a wife induces her husband to execute a deed of separation, in contemplation of a renewal of illicit intercourse (x). Where, however, it is not in her contemplation at the time, but she

(t) Fanshawe v. Welsby, 30 B. 243; Wood v. Cook, 40

(x) Brown v. Brown, 7 Eq. 185; and see Evans v. Carrington, 2 D., F. & J. 481; and Evans v. Edmonds, 13 C. B. 777.

C. D. 461; Blake v. Power, 37 W. R. 461. (u) Baker v. Monk, 33 B. 719; Clark v. Malpas, 31 B. 80; Linquate v. Ledger, 2 Giff. 137; and see O'Rorke v. Bolingbroke, 2 App. Cas. 814; and Re Fry, 40 C. D. 104.

does in fact subsequently commit adultery, then as there was no original fraud, the subsequent adultery will not avoid the settlement (u).

- 6. The case of Nanney v. Williams (z) is another instance of the action of the court where mistake or undue influence, or both combined. There the settlor made an irrevocable exist. voluntary settlement in favour of a relation who acted as his solicitor in the matter. The court considered on the evidence that the settlor believed that he had a power of revocation; and as by his will, made subsequently, he purported to devise the settled property, it was held that he had thereby, in effect, exercised the power of revocation which he thought was contained in, and which ought to have been contained in, the settlement. And consequently the court held that the settlement was effectually cancelled.
- 7. Absence of power of revocation immaterial. where no mistake or fraud.—A father transferred stock into the names of his son and a banker, and told the latter to carry the dividends to the son's account. The father subsequently made a codicil to his will, ignoring the trust thus declared. The Master of the Rolls, however, said: "If the transfer is not ambiguous, but a clear and unequivocal act, I must take it on the authorities that for explanation there is plainly no place. If, then, it cannot be admitted to explain, still less can it be allowed

<sup>(</sup>y) Seagrave v. Seagrave, 13 Ves. 443.(z) 22 B. 452.

to qualify the operation of the previous act; the transfer being held an advancement, nothing contained in the codicil, nor any other matter ex post facto, can ever be allowed to alter what has been already done" (a).

8. In Phillips v. Mullings (b) the facts were these. A young man of improvident habits, being entitled to a sum of money, was induced bonâ fide, by the trustee of the money and by a solicitor, to execute a settlement. By it he assigned a part of the money to trustees, upon trust to invest, and to pay him during his life the income thereof as they should think fit; and after his death upon trust for his wife and children (if any), and in default thereof, and subject thereto, upon trust for certain of his cousins. There was no power of revocation or of appointment, nor a power to nominate new trustees; the deed, was, however, fully explained to him before its execution, and his attention called to the particular clauses. Some years afterwards he attempted to upset this deed, but the court held that it was irrevocable. Lord Hatherley said: "It is clear that anyone taking any advantage under a voluntary deed and setting it up against the donor, must show that he thoroughly understood what he was doing; it cannot, however, be laid down that such a deed would be voidable unless it contained a power of

<sup>(</sup>a) Crabb v. Crabb, 1 M. & K. 511.(b) 7 Ch. App. 244.

revocation" (c). In Henry v. Armstrong (d) Kay, J. (whose attention does not seem to have been called to Phillips v. Mullings), laid down the law rather more favourably to the beneficiaries, saving: "No doubt there are to be found in the reported cases, dicta to the effect that the onus of supporting a voluntary deed rests upon those who set it up: but I do not think that these dicta go so far as to say, that whenever a voluntary settlement is impeached on any ground whatever, the onus is at once thrown on those who would maintain it. As I understand it, the law is, that anybody of full age and sound mind, who has executed a voluntary deed by which he has denuded himself of his own property, is bound by his own act; and if he comes to have the deed set aside—especially if he comes a long time afterwards—he must prove some substantial reason why the deed should be set aside." It is respectfully apprehended that Lord Justice Kay's dictum is quite consistent with Lord Hatherley's; for the latter merely said that where the beneficiaries set up the deed against the donor, the onus is upon the beneficiaries; while the Lord Justice said, that where the settlor asks to have the deed set aside, the onus is upon him. In short, the onus is, in general, upon the person seeking relief, unless the beneficiary occupied a fiduciary position towards the settlor.

<sup>(</sup>c) See also Hoghton v. Hoghton, 15 B. 278; and Hall v. Hall. 8 C. D. 329.

<sup>(</sup>d) 18 C. D. 668. The authorities are by no means satisfactory as to the question of onus.

9. Undue Religious Influence.—On the other hand, where a confidential relationship exists between the settlor and the beneficiary at the date of the settlement, the onus is decidedly thrown on the beneficiary of proving affirmatively, not only that there was no undue influence exerted, but that the settlor had independent advice, and that the settlement contains all usual and proper powers and provisions, and if there are any unusual provisions, that they were brought to the notice of and understood by the settlor. Thus, in the leading case of Huguenin v. Baseley (e), where a widow lady, very much under the influence of a clergyman, made a voluntary settlement in his favour, it was held to be invalid. As Bowen, L. J., said in a recent and most important leading case (f), "It is plain that Equity will not allow a person who exercises or enjoys a dominant religious influence over another, to benefit directly or indirectly by the gifts which the donor makes under or in consequence of such influence, unless it is shown that the donor, at the time of making the gift, was allowed full and free opportunity for counsel and advice outside—the means of considering his or her worldly position, and exercising an independent will about it. This is not a limitation placed on the action of the donor; it is a fetter placed on the conscience of the recipient of

<sup>(</sup>e) 14 V. 273. (f) Allcard v. Skinner, 36 C. D. 145, 190; and see also Morley v. Loughman, (1893) 1 Ch. 736.

the gift, and one which arises out of public policy and fair play."

10. Undue Influence by Solicitor .- On similar grounds, a gift made by a client to a solicitor, while the relation of solicitor and client exists, is voidable. And although such gift may be ratified after the relation has ceased to exist, yet, in order to establish ratification, it must be proved to the satisfaction of the court that the donor, at the time when he was a free agent, and knew of his right to recall the gift, intentionally determined to forego that right. In the absence of such evidence, the gift may be avoided, not only by the donor, but by his personal representatives (g). As Cotton, L. J., said (h): "We must find something equivalent to a present gift when the influence arising from the existence of the relationship had ceased to exist: in the words of Turner, L. J., in Wright v. Vanderplank (i), there must be 'a fixed, deliberate, and unbiassed determination that the transaction should not be impeached.' In the case of a gift to a solicitor, the court looks most carefully to see if there has been a fixed, deliberate, and unbiassed determination on the part of the donor that the transaction should not be impeached."

11. Undue Parental Influence.—So, where a deed

<sup>(</sup>g) Tyars v. Alsop, 37 W. R. 339.
(h) Ib., at p. 340.
(i) 8 De G., M. & G. 133; 4 W. R. 410; and see also Mitchell v. Homfray, 8 Q. B. D. 587; 29 W. R. 558.

conferring a benefit on the settlor's father is executed by a child who is not yet emancipated from his father's control; if the deed is subsequently impeached by the child, the onus is on the father to show that the child had independent advice, and that he executed the deed with full knowledge of its contents, and with the full intention of giving the father the benefit conferred by it (k). However, where such a deed is substantially a resettlement of family estates (as distinguished from a mere voluntary trust in favour of a parent), it is not essential that the child should have independent advice; and the court will not inquire whether the influence of the father was exerted with more or less force (1). No doubt, where the father obtained a benefit under such a deed, the jealousy of the court is aroused; yet, if, on the whole facts, the benefit is not an unfair one, the court will not set it aside (m). These remarks, however, do not extend to the case where a father obtains a benefit under his daughter's marriage settlement. In such cases, the daughter ought to have independent advice (m).

12. Acquiescence.—Where a father induced a young son, who was still under his roof, and sub-

(m) Tucker v. Bennett, supra.

<sup>(</sup>k) Bainbrigge v. Browne, 18 C. D. 188; and see Tate v. Williamson, 2 Ch. App. 55; Kempson v. Ashbee, 10 Ch. App. 15, and cases cited; and Tucker v. Bennett, 38 C. D. 1.

<sup>(</sup>l) Hoblyn v. Hoblyn. 41 C. D. 200; and see Bainbrigge v. Browne, supra.

ject to his influence, to make a settlement in favour of his step-brothers and sisters, it was held, that if the son had applied promptly, the court would have set it aside. But as he had remained quiescent for some years, and had made no objection to the course which he had been persuaded to follow, he was not entitled to relief. For by so doing, he had in his maturer years practically adopted and confirmed that which he had done in his early youth (n). Nor will the court interfere where the settlor subsequently acts under the deed, or does something which shows that he recognizes its validity; unless, indeed, he was ignorant of the effect of the settlement at the date of such recognition (o).

13. So where a lady entered a religious sisterhood, and, under circumstances which amounted to undue influence, made a voluntary settlement in favour of the sisterhood, but omitted, for more than six years after severing her connection with it, to seek to have the settlement set aside, it was held that her acquiescence barred her claim for relief. As Lindley, L. J., said: "In this particular case, the plaintiff considered, when she left the sisterhood, what course she should take; and she determined to do nothing, but to leave matters as they were. She insisted on having back her

<sup>(</sup>n) Turner v. Collins, 7 Ch. 329.
(o) Jarratt v. Aldon, 9 Eq. 463; Motz v. Moreau, 13 M.
P. C. 376; Wright v. Vanderplank, 2 K. & J. 1; Milner v. Lord Harewood, 18 V. 259; Davies v. Davies, 9 Eq. 468. As to ignorance, see Lister v. Hodgson, 4 Eq. 30.

will, but she never asked for her money until the end of five years or so after she left the sisterhood. In this state of things I can only come to the conclusion that she deliberately chose not to attempt to avoid her gifts, but to acquiesce in them. I regard this as a question of fact, and upon the evidence I can come to no other conclusion than that which I have mentioned "(p).

14. Change of status.—An instance of the effect of change of status in preventing the settlor from procuring the cancellation of a settlement, even where its execution was induced by most serious misrepresentations, is afforded by the case of Johnston v. Johnston (q). There the settler had married a lady who represented to him that she had divorced her first husband for adultery and cruelty; whereas, in point of fact, she herself had been divorced for adultery at his suit. The settlor, on discovering this, commenced an action to have the settlement set aside. Pearson, J., dismissed it as being frivolous and vexatious; and the Court of Appeal confirmed his decision, on the ground that the plaintiff could not set aside the settlement and yet keep the only consideration which was given for it; one essential condition of cancellation being (as Fry, L. J., observed) restitutio in integrum, which was there impossible.

 <sup>(</sup>p) Allcard v. Skinner, 36 C. D. 145.
 (q) 52 L. T. 76.

- Art. 15.—When void as against Settlor's Creditors under 13 Eliz. c. 5 (r).
  - (1) A settlement of hereditaments (s), corporeal or incorporeal, or of such kinds of personal property as are capable of being taken in execution (t), is (independently of the bankruptcy law)
  - (r) In this article I have attempted to digest the effect of the statute 13 Eliz. c. 5, passed "for the avoiding of feigned, covinous, and fraudulent feoffments, &c., contrived of malice, fraud, covin, collusion, or guile, to delay, hinder, or defraud creditors or others," by which it was enacted, that "all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods, chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution to and for any intent or purpose before declared and expressed, shall be deemed and taken only as against that person or persons, his or their heirs, successors, executors, administrators and assigns whose action, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs by such guileful, covinous or fraudulent devices and practices as is aforesaid are, shall, or might be in any ways disturbed, delayed or defrauded, to be clearly and utterly void, frustrate and of none effect; any pretence, colour, feigned consideration, or any other matter or thing to the contrary notwithstanding." By the fifth section it was provided that the act should not extend to any estate or interest in lands, &c., or goods, &c. assured upon good consideration and bona fide to any person not having at the time of such assurance any notice or knowledge of such covin, fraud or collusion."

(s) Copyholds formerly not included (Matthews v. Feaver, 1 Cox, 272), but now included by effect of 1 & 2

Viet. c. 110, s. 11.

(t) Rider v. Kidder, 10 V. 360. As to what goods come under this description, see Barrack v. McCullock, 3 K. & J. 110; Stokoe v. Cowan, 29 B. 637. And as to choses in action, Norcut v. Dodd, Cr. & Ph. 100; and 1 & 2 Vict. c. 110.

- void as against existing and future creditors of the settlor if it be executed with intent to defeat or delay their claims.
- (2) Provided, nevertheless, that settlements otherwise void under this article, are valid in favour of persons (whether original beneficiaries or their assigns) who, bonâ fide and without notice of the intended fraud, have acquired their beneficial interests by giving, or being privy to, valuable consideration (u).

Considerable conflict of judicial opinion has arisen over this statute, viz., whether an *intent* to defeat or delay creditors must be inferred as a matter of law where the reasonable and probable result of the settlement was to defeat or delay, although the tribunal might be convinced that, as a matter of fact, the settlor never had any such intention. In Freeman v. Pope (x) the late Lord Hatherley distinctly affirmed that such an intent must be inferred, saying: "The principle on which the statute of Elizabeth proceeds is this, that per-

<sup>(</sup>u) George v. Milbanke, 9 V. 189; Daubeny v. Cockburn, 1 Mer. 638; and Halifux Joint Stock Bank v. Gledhill, (1891) 1 Ch. 31. And where the consideration for a settlement is marriage, and the intended wife knows nothing of the fraudulent intention, the settlement is good quà her and her children (Kevan v. Crawford, 6 C. D. 29).
(x) 5 Ch. App. 540.

sons must be just before they are generous, and that debts must be paid before gifts can be made. The difficulty the Vice-Chancellor seems to have felt in this case was, that if he, as a special juryman, had been asked whether there was actually any intention on the part of the settlor in this case to defeat, hinder or delay his creditors, he should have come to the conclusion that he had no such intention. It appears to me, that this does not put the question exactly on the right ground, for it would never be left to a special jury to find whether the settlor intended to hinder, delay or defeat his creditors, without a direction from the judge that if the necessary effect of the instrument was to defeat, hinder or delay creditors, that necessary effect was to be considered as evidencing an intention to do so. . . . Of course there may be cases (of which Spirett v. Willows (y) is an example) in which there is direct and positive evidence to defraud; . . . but it is established by the authorities, that, in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effec-

<sup>(</sup>y) 11 Jur. N. S. 70; and see also Harman v. Richards, 10 Ha. 89; Strong v. Strong, 18 B. 511; Columbine v. Penhall, 1 Sm. & G. 228; Reese River Co. v. Atwell, 7 Eq. 347; Barling v. Bishop, 29 B. 417; Re Pearson, 3 C. D. 807.

tual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute." And Lord Justice Giffard said: "Where the settlement is voluntary, the intent may be inferred in a variety of ways. For instance, if, after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, the law infers intent. Again, if, at the date of the settlement, the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them. That being so the appeal must be dismissed."

These dicta of Lord Hatherley and Lord Justice Giffard that "if the necessary effect of the instrument was to defeat, hinder, or delay creditors, the judge or jury must as a matter of law infer fraudulent intent, can, however, no longer be accepted as correct, the Court of Appeal, in Ex parte Mercer (2), and the Privy Council in Godfrey v. Poole (a), having decided that the proper principle is that: "The language of the act being, that any conveyance of property is void against creditors if it is made with intent to defeat, hinder, or delay

<sup>(</sup>z) 17 Q. B. D. 290.(a) 13 App. Cas. at p. 503.

creditors, the court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the intention of the settlor, in making the settlement, was to defeat, hinder, or delay his creditors "(b).

The confusion which has arisen has doubtless been caused (as was recently pointed out by Lord Justice Bowen in a case not arising under this statute (c)) by the fact that equity judges have always had to decide questions of law and fact together. "An equity judge, when he had to deal with a question of fraud, discussed his reasons for coming to the conclusion that there had been fraud; and it very often happened, that an equity judge decided that there was fraud in a case in which gross negligence had been proved. If the case had been tried with a jury, the judge would have pointed out to them that gross negligence might amount to evidence of fraud, if it were so gross as to be incompatible with the idea of honesty; but even gross negligence, in the absence of dishonesty, did not of itself amount to fraud. Cases of gross negligence in which the Chancery judges decided that there had been fraud, were piled up one upon another, until at last a notion came to be entertained that it was sufficient to prove gross negligence in order to establish fraud. That is not so. In all these cases fraud and dishonesty were

<sup>(</sup>b) Per Kindersley, V.-C., in Thompson v. Webster, 4
Drew. 632, adopted and approved by the Privy Council in Godfrey v. Poole, supra.
(c) Le Lievre v. Gould, (1893) 1 Q. B. at p. 500.

the proper ratio decidendi, and gross negligence was only one of the elements which the judge had to consider in making up his mind whether the defendant's conduct had been dishonest."

The same view had been previously expressed by Lord Esher, M. R., in Ex parte Mercer, Re Wise (d), where his Lordship said: "No doubt, in coming to a particular conclusion as to the intention in a man's mind, you should take into account the necessary result of the acts which he has done. I do not use the words 'necessary result' metaphysically, but in their ordinary business sense; and, of course, if there was nothing to the contrary, you would come to the conclusion that the man did intend the necessary result of his acts. But if other circumstances make you believe that the man did not intend to do that which you are asked to find that he did intend—to say that because that was the necessary result of what he did, you must find, contrary to the other evidence, that he did actually intend to do it, is to ask one to find that to be a fact which one really believes to be untrue in fact." Lord Justice Lindley in the same case added: "The language which has been used in a great many cases, that a man must in point of law be held to have intended the necessary consequences of his own acts, is apt to mislead, by confusing the boundary between law and fact -between consequences which can be foreseen with those which cannot." The rule, therefore, according to the more recent decisions, is that of common sense, viz., that the court has to decide as a fact in each ease, what, on the whole evidence, was the intention of the settlor in making the settlement, and is not obliged to infer fraudulent intent where it did not in fact exist.

ILLUST. 1. Direct fraud.—In Twynne's case (e) Pierce was indebted to Twynne in 400%, and to C. in 2001. C. brought an action for his debt, and, pending the result. Pierce conveyed all his goods. to the value of 300%, to Twynne in satisfaction of his debt; but Pierce continued in possession of them. Here the court held that there was direct evidence of an intention on the part of Pierce to hinder and delay C.; and that although Twynne had given valuable consideration for the goods, yet he was privy to the fraud, and consequently could not avail himself of the proviso. was laid upon the fact that Pierce was allowed to remain in possession of the goods, although the conveyance purported to be not a mere mortgage, but an absolute alienation. Had it been a mortgage, of course the mere fact of the mortgagor retaining possession would have been no badge of fraud, as it is one of the usual incidents of a mortgage (f). The main and substantial point, however, which the court decided was, that it was obvious, for divers reasons, that the conveyance was a mere fraudulent arrangement between

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<sup>(</sup>e) 1 Sm. Lead. Cas. 1. (f) Edwards v. Harben, 2 T. R. 587.

Twynne and Pierce to shelter the latter from the just demands of his creditors, and was therefore void under the statute.

- 2. Direct intent to avoid anticipated judgment.—So, again, where a director of a company was sued by the company, and fearing that a judgment would be given against him, made a voluntary assignment to his daughter of all his property, it was held that the fraudulent intention was manifest, and that the settlement was void as against the company, although they were not creditors at the time, and it did not appear that there were any creditors at the time (g). Even though the daughter was no party to the fraud, yet she was not protected, because she had not given valuable consideration.
- 3. Direct intent to delay future creditors.—And so, again, in *Spirrett* v. *Willows* (h), the settlor being solvent at the time, but having contracted a considerable debt which would fall due in the course of a few weeks, made a voluntary settlement by which he withdrew a large portion of his property from the payment of debts, after which he collected the rest of his assets and spent them in the most reckless way, thus depriving the expectant creditor of the means of being paid. In that case there was clear and plain evidence of an actual intention to defeat creditors, and accordingly the settlement was set aside.

<sup>(</sup>g) Reese River Co. v. Attwell, 7 Eq. 347.(h) 3 De G., J. & S. 293.

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- 4. Again, a trader, who had for many years carried on the business of a baker and had saved money, being about to purchase a grocery business which he intended to carry on in addition to the other, made a voluntary settlement of the bulk of his property for the benefit of his wife and children. He afterwards bought the grocery business and carried it on for about six months, but lost money by it. He then sold it for as much money as he had given for it, and afterwards carried on the baker's business alone until, about three years after the execution of the settlement, he filed a liquidation petition, his liabilities largely exceeding his assets. The debts which he owed at the date of the settlement had been all paid. On these facts, it was held that (independently of the question whether he was solvent at the date of the settlement) the settlement was void as against his creditors, on the ground that it was evidently executed with the view of putting the settlor's property out of their reach, in case he should fail in the speculation on which he was about to enter in carrying on a new business of which he knew nothing (i).
- 5. And so generally "a man is not entitled to go into a hazardous business, and immediately before doing so, to settle all his property voluntarily; the object being, 'If I succeed in business, I make a fortune for myself. If I fail, I leave

<sup>(</sup>i) Ex parte Russell, Re Butterworth, 19 C. D. 588; and see also Ware v. Gardner, 7 Eq. 317.

my creditors unpaid. They will bear the loss.' That is the very thing which the statute of Elizabeth was meant to prevent "(k).

6. Marriage settlement executed with fraudulent intent.—Most of the above examples have been cases of voluntary settlements; but where there is an express intention to defeat creditors, and all parties to the consideration are parties to that intention, the fact that it was a settlement based on value will not render it valid against the settlor's Thus, where one, by marriage settlecreditors. ment, settles his own property on himself until bankruptcy, and then over, it is so clearly intended to defraud creditors that the wife must be assumed to have been party to that intention, and the trust over on bankruptcy will therefore, as against the general body of his creditors, be void (l). This case must, however, be carefully distinguished from that of Re Detmold, Detmold v. Detmold (m). There the settlor, on his marriage, settled property on himself until bankruptcy, or until he should "assign, charge, or incumber the income, or should do or suffer something whereby the same or part thereof would, through his act or default, or

<sup>(</sup>k) Per Jessel, M.R., Ex parte Russell, supra; following Mackay v. Douglas, 14 Eq. 106. An unconscious paraphrase of Shakespear, "If, like an ill venture, it come unluckily home, I break, and you, my gentle creditors, lose."

<sup>(</sup>l) Higginbottom v. Holme, 19 V. 88; Ex parte Hodgson, ib. 208; Re Pearson, 3 C. D. 807; and see also Ex parte Bolland, Re Clint, 17 Eq. 115, for another instance of a settlement clearly fraudulent.

<sup>(</sup>m) 40 C. D. 585.

by operation of law, become vested in or payable to some other person," in which event the income was to become payable to the wife. A single creditor of the husband obtained judgment against him, and a receiver of the settled income was appointed by way of equitable execution. The settlor afterwards became bankrupt. It was, however, held, by North, J., that although, if the husband had first become bankrupt, the trust over in favour of the wife would have been invalid against the general body of creditors, yet it was valid as against a particular judgment creditor, and that having once taken effect, the subsequent bankruptey of the settlor could not divest the estate, which had vested in the wife. The learned judge distinguished the case from those above cited, on the ground that a gift over on alienation by a settlor is valid, and that the effect of the receivership order was involuntary alienation, taking place before the commencement of the bankruptcy. The distinction, however, is very fine, and it is, with unfeigned respect, suggested, that if (as seems clear) a gift over on bankruptey is void against creditors, because it evidences an intention to defeat or delay them, so by parity of reasoning, a gift over on the settlor charging his interest (i.e., to secure a debt), or suffering something (i.e., an execution), whereby the same would, by operation of law, become payable to another, equally evidences a dishonest intent to escape from his just Moreover, surely the gift over on bankruptcy of itself proved an intent to defeat or delay creditors, and, the intent being proved, the

statute avoids the settlement, not only against the general body of creditors, but against judgment creditors. Of course, if the wife had been a boná fide purchaser for value without notice, no question could have arisen; but under  $Higginbottom \ v.$  Holme(n), and that class of cases, the very form of the settlement was sufficient to fix her with notice of its character.

- 7. Where a person married his mistress, and with the intention of defeating his creditors, and with her knowledge of that intention, settled all or a considerable part of his property upon her, the marriage consideration did not render the settlement valid as against the settler's creditors; for such a marriage was a mere cloak for the fraud, and the wife was particeps criminis (o).
- 8. Fraudulent settlement upheld in favour of bona fide parties to valuable consideration.—But, on the other hand, where a trust based on value would, as between the settlor and his creditors, be clearly void, yet it will be supported as between the creditors and persons parties to the consideration, where such parties are not privy to the settlor's fraudulent intentions. Thus in  $Kevan \ v$ .  $Crawford \ (p)$ , the facts were, that C. (who carried on the business of a flax spinner at S. Mills, in partnership with R.) by a settlement made in

(o) Bulmer v. Hunter, 8 Eq. 46; and see Colombine v.

Benhall, 1 Sm. & Giff. 228.

<sup>(</sup>n) 19 V. 88.

<sup>(</sup>p) 6 C. D. 29; and see Exparte Horne, 54 L. T. 301. The valuable consideration must be substantial, however, and not merely technical; see Re Ridler, 22 C. D. 74. But conf. Harris v. Tubbs, 42 C. D. 97.

contemplation of his marriage, after reciting that he was indebted to his intended wife in a sum of 20,000%, covenanted to pay that sum to the trustees, upon trust that as soon as he should become owner in fee simple of S. Mills (which he had agreed to purchase) they should advance the 20,000% to him on mortgage of those mills. was further declared that the trustees should stand possessed of the 20,000%, when so invested. upon trust to pay the income to the intended wife for life for her separate use, with remainder to the husband during his life or until he should become bankrupt, with remainder to the children of the marriage. The recital that C. was indebted to the intended wife in 20,000%, was quite false, and C. was at the time of the marriage in insolvent circumstances: but the intended wife had no knowledge of his insolvent circumstances, and understood nothing about the recitals in the deed. The settlor subsequently purchased the S. Mills estate, and mortgaged it to the trustees for securing the 20,000%, but no money actually passed. The settlor subsequently became bankrupt, and the creditors claimed that the settlement was void as against them. It was, however, held that, notwithstanding the falsity of the recitals, the settlement and the mortgage deed consequent thereon were valid so far as concerned the interests of the wife and children; for the former was no party to the settlor's fraud, and gave valuable consideration (viz. marriage) for the settlement, and the latter were parties privy to that consideration.

- 9. Where a trust, based on value, is sought to be invalidated as against a party privy to the consideration, or where a voluntary trust is sought to be invalidated as against a purchaser for value from a cestui que trust, it must be conclusively shown that such party was privy and party to the fraudulent intent. For, although he may have known that the effect of the assignment would be to hinder or defeat the assignor's creditors, or expectant creditors, yet if the transaction was a bonâ fide purchase, and not a mere collusive arrangement between the parties with the intention of causing such hindrance or delay, it will be upheld (q). It should also be observed, that the protection afforded to bonâ fide purchaser for value from a beneficiary under a fraudulent deed, is not confined to purchasers of legal estates or interests, but extends to purchasers of mere equitable interests (r).
- 10. Fraudulent intent presumed from surrounding circumstances.—As above stated (p. 128), in the absence of direct evidence of fraudulent intent, it may (if there be no rebutting evidence) be inferred from the fact that the necessary result of the settlement was to defeat or delay the settlor's creditors. The inference is, however, one of fact

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<sup>(</sup>q) See Darville v. Terry, 6 H. & N 807; Hale v. Saloon Omnibus Co., 4 Dr. 492; judgment in Harman v. Richards, 10 Ha. 89; Alton v. Harrison, 4 Ch. Ap. 622; Middleton v. Pollock, 2 C. D. 104; Boldero v. L. & W. Discount Co., 5 Ex. D. 47; but see Spencer v. Slater, 4 Q. B. D. 104.
(r) Halifax Joint Stock Bank v. Gledhill, (1891) 1 Ch. 31.

only, and not an inference of law, and may be rebutted if the evidence as a whole shows that no such intention existed. In Freeman v. Pope (s) the circumstances, so far as they are material, were as follows:—The settlor was a clergyman, with a life income of about 1,000% a year; but at the date of the settlement in question his creditors were pressing him, and he had to borrow from his housekeeper a sum wherewith to pay the most urgent. He handed over to her, as security, the only property he had in the world, and a policy of insurance for 1,000%, upon his own life. The security to the housekeeper exceeded in value her debt by about 2001.; but the settlor also owed a debt of 3391. to his bankers, which was subsequently increased at the date of the settlement to 489% under an arrangement that he would allow his solicitor to receive part of his income, and out of it pay 100% a year towards liquidating the 489%, and would pay the residue into the banker's bank upon a current account. There was no bargain, however, that the bankers would not sue. Being in these circumstances, he executed a voluntary settlement of the life policy in favour of a Mrs. Pope, and having done so, was consequently in this position, that he had nothing wherewithal to pay, or to give security for the debt of 4891., except the surplus value of the furniture; and he was clearly and completely insolvent the moment he executed the settlement. Upon these facts, a

<sup>(</sup>s) 5 Ch. App. 540. See judgment, p. 127, supra-

subsequent creditor instituted a suit to set aside the settlement; on the ground that although there was no actual fraud, yet the effect of the settlement was to defraud creditors, and that as there were creditors antecedent to the settlement still unpaid, he could ask for it to be set aside. And the court held that this was so. Whether, however, this case would have been decided as it was. if the court had felt itself at liberty to consider the entire evidence (according to the now established rule) is problematical; as the court of first instance (at all events) seems to have felt, that if it had been asked whether there was actually any intention on the part of the settlor to defeat, hinder, or delay his creditors, it would have come to the conclusion that he had no such intention.

11. A lady, being indebted to the plaintiff at the time of her marriage, settled all her property (except jewels and furniture) upon certain trusts in favour of herself and her husband and issue, and in default of issue in favour of certain collateral relatives. Before the debt was paid, she and her husband died without issue; and it was held that, quà the collateral relatives, the settlement was voluntary, and that, therefore, as between them and the plaintiff, the settlement was void (t). It is conceived, however, that in the absence of express intent to defeat or delay creditors, no such inference would now be made, the consideration being marriage, and the trans-

<sup>(</sup>t) Smith v. Cherrill, 4 Eq. 390.

action one which was natural and usual on such an occasion.

12. Again, a trader doing business to the amount of 100,000%, a year, executed two voluntary settlements in favour of his wife, the first being two years, and the last one year before his death. By the first, he settled two policies of insurance, each for 1,000%; by the second he settled his furniture. worth about 1,000%. An inquiry into the state of his affairs having been directed, it was found that at the date of the first settlement his debts would have exceeded his assets by 1.2931., and at the date of the second settlement his debts were 10.726/, over his assets. A creditor whose debt was contracted after the date of the first, but before the date of the second settlement, commenced proceedings to set aside both settlements. It was held that, as the settlor's debts exceeded his assets when both deeds were executed, he was then insolvent, and the deeds must be declared fraudulent and void as against the plaintiff and his other creditors; and that the fact that all the settlor's debts in existence at the date of the first settlement had been subsequently paid was immaterial (u). It must be borne in mind that the settlor being dead there was no evidence forthcoming to rebut the prima facie inference of fact, otherwise it is quite conceivable that a similar

<sup>(</sup>u) Taylor v. Coenen, 1 C. D. 636; and for other examples, see Crossley v. Elsworthy, 12 Eq. 159; and Adames v. Hallett, 6 Eq. 468.

case would (in the light of more recent decisions) be decided the other way. In short, the reader is emphatically warned that none of the reported cases of implied fraudulent intent can be now relied upon as authorities, the question of intent being no longer regarded as a question of law, but as purely one of fact in each case.

13. Fraudulent intent not presumed merely from effect.—This was very well exemplified in Ex parte Mercer, Re Wise (x). The facts of that case were as follows:—A master mariner was married at Hong-Kong on May 31st, 1881. In the following August an action for breach of promise of marriage was commenced against him, and the writ served upon him at Hong-Kong on October By the same mail he heard that a legacy of 500l. had become payable to him. On the 17th October he executed a post-nuptial settlement of the 500l. in favour of his wife and issue, being then indebted to no one. In July, 1882, judgment in the breach of promise action went against him for 500l.; and in November, 1884, he was adjudicated bankrupt. It was thereupon attempted to set aside the post-nuptial settlement under Lord Hatherley's dictum in Freeman v. Pope. The bankrupt, however, swore that when he made the settlement he was in no way influenced by the action having been commenced against him, which he thought would come to nothing. On this state of facts the Divisional Court and the Court of

<sup>(</sup>x) 17 Q. B. D. 290; see also Kent v. Riley, 14 Eq. 190.

Appeal declined to set aside the settlement, on the ground that there was not sufficient evidence to warrant a judge or jury in finding that the settlement was intended to delay, hinder, or defraud creditors. Grantham, J., said: "When learned judges have said that if the necessary result of a settlement is to hinder creditors, it must be taken to have been executed with that intent, this observation must be taken as applied to the character of the particular case in which it was made. In all the cases which have been referred to. the settlor had considerable debts or liabilities, and in none of them was there the same reason for making the settlement which existed in the present case, viz., the wish to settle on the wife of the settlor, property to which he had become unexpectedly entitled after his marriage; and it cannot be said that, with the exception of the writ having been served upon him, there was any such inducement for him to make the settlement as there was in all the other cases which have been cited " (y).

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ART. 16.—When void under Bankruptcy Act (z).

(1) Even where a settlement is valid as against creditors under the last pre-

<sup>(</sup>y) And see also observations of Lord Esher, M.R., and Lindley, L.J., in the same case, quoted supra, p. 128. (z) Bankruptcy Act, 1883, s. 47 (1).

ceding article, yet (a) it will be void as against the settlor's trustee in bankruptcy or liquidation (b) under the following circumstances, viz.:—

- a. If it be voluntary, and the settlor becomes bankrupt or liquidates his affairs within two years.
- β. If it be voluntary, and the settlor becomes bankrupt or liquidates his affairs after two but within ten years; unless it can be shown that he was solvent at the date of the settlement without the aid of the property comprised in it, and that his estate or interest in such property passed to the trustee of the settlement on the execution thereof.
- 7. If it consists of a mere covenant or contract made in consideration of marriage, for the future settlement upon the settlor's wife or children, of any specific and ear-marked (c)

<sup>(</sup>a) These provisions were limited to traders by the Bankruptcy Act, 1869, but are extended to the public generally by the Act of 1883, which is not retrospective (Ex parte Todd, 19 Q. B. D. 186).

<sup>(</sup>b) The section does not apply to the winding up of deceased insolvent settlor's estates (Re Gould, 19 Q. B. D. 92).

<sup>(</sup>c) Ex parte Bishop, Re Tonnies, 8 Ch. App. 718.

money or property wherein he had not at the date of his marriage any estate or interest, vested or contingent (d), (and not being money or property of or in right of his wife), unless such property or money has been actually transferred or paid pursuant to such contract or covenant (e).

(2) This article does not affect a settlement of property accrued to the settlor since marriage in right of his wife, or the trusts of a policy of assurance effected in favour of a wife or children under sect. 11 of the Married Women's Property Act, 1882.

ILLUST. 1. Thus, a person made a voluntary settlement of an estate which was subject to a mortgage, and covenanted with the trustees that he would pay the interest on the mortgage, and,

(e) Bankruptey Act, 1883, s. 47 (2). It would also seem that every assignment of future-acquired property would be cancelled by bankruptcy before the property came into existence, inasmuch as until then, such assignments are in reality only contracts to assign. See Collyer v. Isaacs, sup.

<sup>(</sup>d) See Re Andrews, 7 C. D. 635. A formal transfer of future-acquired property is, in reality, nothing more than a contract to assign it when it comes into existence, and would, it is conceived, be a contract within the meaning of this rule. (See Collyer v. Isaacs, 19 C. D. 342; and Joseph v. Lyons, 15 Q. B. D. 280.)

when required, would pay off the principal. It subsequently, and within two years, turned out that his assets (exclusive of the estate in question) were sufficient to pay his debts other than the mortgage debt, but not sufficient to pay both, and he became bankrupt. It was held, that whether the settlement was fraudulent or not within the 13th Elizabeth it was not material to inquire, but that it clearly fell within the provisions of the Bankruptey Act, and was therefore void (f).

2. Upon an application to set aside a postnuptial settlement under clause  $\beta$  of this article, it appeared that, by the settlement, a life interest was reserved to the settlor himself, and that, if this life interest were taken into account, he was able to pay his debts at the date of the settlement; but that if it was not taken into account, he was insolvent. The court held that the settlor's life interest ought to be taken into account in estimating his solvency, and that the settlement was valid as against his trustee in bankruptcy (g).

3. Clause  $\gamma$  of the above article only applies to specific or ear-marked property; and, therefore, where a person by his marriage settlement covenants that he will pay a sum of money to the trustees, such a covenant is perfectly valid. The intention of the act is to prevent settlements of property expected to accrue at a future time, in which the settler has at the date of the settlement

<sup>(</sup>f) Ex parte Huxtable, Re Conibeer, 2 C. D. 54. (g) Re Lowndes, 18 Q. B. D. 677.

no present interest. As Mellish, L. J., put it in Ex parte Bishop, re Tonnics (h): "The object of the legislature was to provide that specific money or property which, but for the section, would have gone to the trustees [of the settlement] exclusively, should be divided among the creditors [of the settlor]. A covenant to settle such money or property would, in equity, have bound it when it came into actual possession, and the intention was, that if the covenantor had no interest at the time, it should go to the creditors, and not to the trustees, of the settlement. If this had been a covenant that in case any property was left to the covenantor by his father or any other person, he would settle it, and the covenantor had no interest in it at the time, the covenant would be void against the trustee in bankruptcy. The word 'money' refers to something of the same nature as 'property,' namely, something specific, and does not apply to that which is a mere debt due from the settlor." Whether, in such cases, property coming to the settlor after his discharge, would remain bound by the covenant is not free from doubt. The section in question only avoids them as against the trustee in bankruptcy, who would, of course, have no claim to property which only vested in the bankrupt after his discharge. It would seem, however, that the bankruptcy would, ipso facto, cancel all the debtor's contracts, including

<sup>(</sup>h) 8 Ch. Ap. 721.

such a one as this (i). It must also be pointed out that documents which purport to assign after-acquired property, are in reality only contracts to do so when the property comes into existence; for "A man cannot in equity, any more than at law, assign what has no existence" (j).

4. Whether settlements void on bankruptey are void against purchasers from beneficiaries.—The question whether a voluntary settlement, or gift, which becomes void by reason of the settlor's bankruptey within two or ten years, is void in toto, so as to take away the rights of bonû fide purchasers for value from the beneficiaries or donees, is not free from doubt. Mr. Justice Stirling has decided that it is, and that no one can safely purchase from such a beneficiary until the ten years have elapsed (k). On the other hand, Mr. Justice Williams has decided that such bonû fide purchasers are protected (l). Until the point comes before the Court of Appeal, it must be considered a doubtful one.

## ART. 17.—When void as against subsequent Purchasers from Settlor.

(1) A settlement of lands is void, as against subsequent bonâ fide pur-

<sup>(</sup>i) See Collyer v. Isaacs, 19 C. D. 342.

<sup>(</sup>j) Collyer v. Isaacs, supra; Joseph v. Lyons, 15 Q. B. D. 280.

<sup>(</sup>k) Re Briggs and Spicer, (1891) 2 Ch. 127.

<sup>(</sup>l) Re Brall, ex parte Norton, (1893) 2 Q. B. 381; and see also Re Vansittart, ex parte Brown, ib. 377.

chasers for value from the settlor, if made with intent to defeat such purchasers (m); or if it is revocable (n).

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(2) Provided always, that this article in nowise prejudicially affects bonâ fide purchasers for value (o), whether beneficiaries under a trust based on value, but fraudulent in inception, or assigns of voluntary beneficiaries (p).

The law on this subject, the foundation for which is the Statute 27 Eliz. c. 4, has to a large extent been revolutionized by the Voluntary Conveyances Act, 1893(q). Although the statute of Elizabeth does not in any way speak of voluntary conveyances, it was for nearly 300 years held, in a long line of decisions, that every voluntary conveyance or settlement was impliedly fraudulent within that statute as against subsequent purchasers, even although no actual intention to defraud existed at the date of the settlement

<sup>(</sup>m) 27 Eliz. c. 4. The word "purchasers" includes mortgagees and lessees (Dolphin v. Aylward, 4 H. L. 486; Doe v. Mores, 2 W. Bl. 1019). As to copyholds, see Doe v. Bottriell, 5 B. & Ad. 131; Currie v. Nind, 1 M. & C. 17; and as to leaseholds, last note to Saunders v. Dehen, 2 Ver. 272.

<sup>(</sup>n) 27 Eliz. c. 4; and see Standon v. Bullock, cit. 3 Rep. 82 b; Lavender v. Blackston, 3 Keb. 526; Jenkins v. Kemiss, 1 Lev. 150.

<sup>(</sup>o) 27 Eliz. c. 4, s. 4.

<sup>(</sup>p) Prodgers v. Langham, Keb. 486.

<sup>(</sup>q) 56 & 57 Vict. c. 21.

impeached (r). This was purely judge-made law, and rested on the theory that, by selling the property afterwards for valuable consideration, the settlor so entirely repudiated the former voluntary settlement, and showed his intention to sell, as to raise against him and the beneficiaries a conclusive presumption that such intention existed when he made the voluntary settlement, and consequently that the latter was made with intent to defeat the subsequent purchaser (s). This principle appears to be somewhat far-fetched, and of late years has frequently been alluded to with disapprobation by learned judges, but accompanied by an intimation that nothing less than legislative interference could alter a rule which had been uniformly acted on for so long a period. At length Parliament has intervened, and by the above-mentioned Act of 1893, it is enacted that "No voluntary conveyance of any lands, tenements, or hereditaments, whether made before or after the passing of this Act, if in fact made bonâ fide and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding." The Act does not extend to cases where the subsequent purchase has been made before the 29th of

<sup>(</sup>r) Doe v. Manning, 9 East, 57; Trowell v. Shenton, 8 C. D. 318. (s) Per Campbell, C. J., Doe v. Rusham, 17 Q. B. 723.

June, 1893; and, as many titles depend upon the validity of such subsequent purchases made before that date, it seems necessary to give some examples of the old law. It is also necessary to remind the reader that although, by reason of this statute, voluntary conveyances will no longer be ipso facto void as against subsequent purchasers for value, yet, under the general doctrines of equity, a voluntary conveyance may be postponed to a subsequent purchaser for value without notice if the latter should get a conveyance of the legal estate, or if the beneficiaries under the voluntary settlement have been guilty of negligence, and the settlement did not vest the legal estate in a trustee for them (t).

ILLUST. 1.—Express intent to defraud.—Instances of settlements framed with the express intention of defrauding subsequent purchasers are rare; but if A. and B. were to conspire together, that A. should sell his lands to B., and that A. should retain the title deeds in order to enable him to sell the land over again to C., the conveyance to B. would be void under the statute as against C.

2. Power of Revocation.—So again, where there was, under a marriage settlement, a power reserved to the settlor to grant a long lease with or without rent, it was held that that was practically a power of revocation pro tanto, and that a subsequent

<sup>(</sup>t) See Cave v. Cave, 15 C. D. 639; Briggs v. Jones, 10 Eq. 92; Northern Ass. Soc. v. Whipp, 26 C. D. 482; and judgment of Kekewich, J., in Harris v. Tubbs, 42 C. D. 79.

mortgagee of the settlor was entitled to the property for the period during which a lease could

have been granted (u).

3. Examples of the law prior to June, 1893.—An excellent example of the old law is afforded by the case of Trowell v. Shenton (x). There, an infant had written to his betrothed, promising that on coming of age he would settle seven specified houses on her. No settlement was made for fifteen years, at the expiration of which, he settled these seven and two other houses upon her, but on different trusts to those mentioned in the letter. and without in any way referring to that letter. Some few years after this, he agreed to sell three of the houses to a purchaser. In an action by the purchaser for specific performance of this agreement, it was held that the settlement was void as against him. For, as the settlement did not refer to any previous agreement, dealt with other property than that mentioned in the letter, and settled the property in a different way, there was no ratification in writing of the promise contained in that letter, and the settlement was therefore purely post-nuptial and voluntary. It must, however, be pointed out that, as the invalidity of voluntary deeds as against subsequent purchasers depended entirely on an original intention presumed from the fact of the settlor's subsequent attempt to sell, the doctrine only applied when the settlor himself subsequently sold, and not where the subsequent

<sup>(</sup>u) Lavender v. Blackston, 3 Keb. 526.

<sup>(</sup>x) 8 C. D. 318.

vendor was his heir, or a second voluntary grantee of the settlor (y).

4. However, even under the old law a very small consideration would suffice to remove a bonâ fide settlement from the category of voluntary settlements for the purposes of the act of Elizabeth; far less than will suffice to support a settlement made by an insolvent as against his creditors (z). Thus it was held, in Price v. Jenkins (a), that a settlement of leaseholds to which liability to pay rent and perform covenants was attached, was, from the very nature of the property, based on value; for the beneficiaries thereby took upon themselves the primary discharge of those liabilities. It is, however, humbly questioned whether the decision in Price v. Jenkins could stand if it should ever (which is now improbable) come before the House of Lords. For, if undertaking the liability to pay rent and keep in repair, is a valuable consideration for a settlement or gift of leaseholds, it would seem to follow that the liability to pay rates and taxes would be a valuable consideration for a gift of freeholds, in which case no gift of real estate could ever be voluntary—a palpable reductio ad absurdum. is therefore conceived that a consideration can only be considered valuable, which entails on the party

(y) Per Campbell, C.J., Doe v. Rusham, supra; and see Parker v. Carter, 4 Ha. 409.

<sup>(</sup>z) See Re Ridler, 22 C. D. 74; Hamilton v. Molloy, 5 L. R., Ir. 339; Rosher v. Williams, 20 Eq. 210; Re Hillman, 10 C. D. 622. But see Harris v. Tubbs, 42 C. D. 79.

(a) 5 C. D. 619.

rendering it the liability to give or do something which is not merely incidental to the ownership of the property for which the consideration is given, but something entirely beyond and apart from such incidents. Anyhow, the decision in Price v. Jenkins has no application where leaseholds are settled by way of sub-demise, as no onus is thereby imposed on the trustees (b).

5. However it was quite clear that where there was any substantial bonâ fide consideration, the statute did not, even under the old law, apply in the absence of express fraud. For instance, where there were mutual promises, each was considered to be a valuable consideration for the other. Thus it was settled, that if husband and wife, each of them having interests, no matter how much, or of what degree or what quality, came to an agreement which was afterwards embodied in a settlement, that was a bargain between husband and wife, which was not a transaction without valuable consideration (c). But where property was devised to the wife for her separate use, the husband had no estate or interest in it; and consequently, if it were settled by the husband and wife, such a settlement was not considered to be based on value, inasmuch as the husband had no rights to modify (d). And the same principle would of course apply to property belonging to a married

<sup>(</sup>b) Shurmer v. Sedgwick, 31 W. R. 884.

<sup>(</sup>c) Teasdale v. Braithwaite, 4 C. D. 90; affirmed, 5 C. D. 630; Re Foster and Lister, 6 C. D. 87; and Schrieber v. Dinkel, 54 L. J., Ch. 241.

<sup>(</sup>d) Shurmer v. Sedgwick, 24 C. D. 604.

woman under the Married Women's Property Act, 1882.

- 6. Under the old law it was repeatedly held (although modern judges expressed strong disapproval of it), that knowledge of the existence of a voluntary settlement by a subsequent purchaser did not deprive him of the statutory priority (e). However, the voluntary settlement was not cancelled unless the subsequent sale was a real bonâ fide alienation. Thus, where the consideration for the subsequent purchase was grossly inadequate, the sale might be impeached by the voluntary beneficiaries, on the ground that it was on the face of it a collusive arrangement between the settlor and the so-called purchaser for the purpose of relieving the former from the settlement (f).
- 7. The settlement was, however, void only so far as was necessary to give effect to the subsequent transaction. For instance, in the case of property settled by a voluntary settlement, and subsequently mortgaged, the beneficiaries under the voluntary trust were entitled, subject to the mortgage; and if unsettled estates were included in the mortgage, the beneficiaries were entitled to throw the mortgage on to the unsettled estates, if they were sufficient to answer it (g).

(e) Doe v. Manning, 9 East, 59.

<sup>(</sup>f) Doe v. Routledge, Cowp. 705; Metcalfe v. Pulvertoft, 1 V. & B. 184.

<sup>(</sup>g) Hales v. Cox, 32 B. 118.

#### CHAPTER IV.

THE CONSTRUCTION OF DECLARED TRUSTS.

Art. 18.—Executed Trusts construed strictly, and Executory liberally.

A trust in which the limitations of the estate of the trustee and the beneficiaries are perfected and declared by the settlor is called an executed trust (a).
 In the construction of executed trusts, technical terms are construed in their legal and technical sense (b).

(2.) A trust in which the limitations of the estate are not perfected and declared by the settlor, but only an agreement made for the subsequent creation of a trust, or certain instructions or heads of settlement indicated from which the trustee is subsequently

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<sup>(</sup>a) See Stanley v. Lennard, 1 Eden, 95.

<sup>(</sup>b) Wright v. Pearson, 1 Ed. 125; Austen v. Taylor, ibid. 367; Brydges v. Brydges, 3 Ves. jun. 125; Jervoise v. Duke of Northumberland, 1 J. & W. 571.

to model, perfect and declare the trust (c), is called an executory trust. In the construction of executory trusts, the court is not confined to the language used by the settlor. And where that language is improper or informal (d), or would create an illegal trust (e), or would otherwise defeat the settlor's intentions (as gathered from the motives which led to the settlement, and from its general object and purpose, or from other instruments to which it refers, or from any circumstances which may have influenced the settlor's mind (f), the court will not direct an executed settlement according to the strict meaning of the words used, but will order it to be made in a proper and legal manner so as best may answer the intent of the parties (g).

(d) See Earl of Stamford v. Sir John Hobart, 3 Br. P. C. Tarl. ed. 31—33.

(f) See per Lord Chelmsford in Sackville West v. Holmesdale, 4 H. L. 543.

<sup>(</sup>c) See Austen v. Taylor, 1 Eden, 366; Lord Glenorchy v. Bosville, For. 3; and Stanley v. Lennard, supra. And see per Cairns, L.C., in Sackville West v. Holmesdale, 4 H. L. 543.

<sup>(</sup>e) Humberston v. Humberston, 1 P. W. 332.

<sup>(</sup>g) Earl Stamford v. Sir John Hobart, supra; and see Cogan v. Duffield, 2 C. D. 44.

ILLUST.—1. Instances of executed and executory trusts.—A father conveys freeholds to trustees upon certain trusts in favour of his daughters, and also covenants to surrender copyholds to the same trustees, to be held by them on similar trusts. Here the trust of the freeholds is an executed trust; for the estates of the trustee and of the beneficiaries are perfect, and require nothing more to be done. The trust of the copyholds, on the other hand, is an executory trust; for something remains to be done in order to perfect the settlement, viz., that the property should be legally vested in the trustees.

- 2. So, where a testator by will gives property to trustees, in trust to cause it to be settled on his daughter in strict settlement, that is an executory trust; and so are agreements for settlements, such as marriage articles.
- 3. Rule in Shelley's case, when applied.—If an estate is vested in trustees and their heirs, in trust for A. for life without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of A.'s body, the trust being an executed trust, A. (according to the rule in Shelley's case, which is a rule of law and not merely a construction) will be held to take an estate tail (h). Of course, where the doctrine could not apply in law (owing to the

<sup>(</sup>h) Wright v. Pearson, 1 Ed. 119; Austen v. Taylor, ibid. 361; Jones v. Morgan, 1 Bro. C. C. 206; Jervoise v. Duke of Northumberland, 1 J. & W. 559.

life estate being equitable and the remainder legal, or vice versâ), the rule will not apply in equity (i): nor where the word "heir" is used in the sense of persona designata (k); as, for example, where the ultimate limitation is "to the person who may then be the heir of A."

- 4. On the other hand, in the leading case of Lord Glenorchy v. Bosville (1), the settlor devised real estate to trustees upon trust, upon the happening of the marriage of his grand-daughter, to convey the estate to the use of her for life, with remainder to the use of her husband for life, with remainder to the issue of her body, with remainders over. It was held, that though the granddaughter would have taken an estate tail had it been an executed trust, yet as the trust was executory, it was to be executed in a more careful and accurate manner; and that as the testator's intention was to provide for the children of the marriage, that intention would be best carried out by a conveyance to the grand-daughter for life, with remainder to her husband for life, with remainder to her first and other sons in tail, with remainder to her daughters.
- 5. And so in marriage articles, a covenant to settle estates to the use of the husband for life, with remainder to the wife for life, with remainder to their heirs male and the heirs of such heirs male.

<sup>(</sup>i) Collier v. M'Bean, 34 Beav. 426.
(k) Greaves v. Simpson, 10 Jur. N. S. 609.
(l) 1 W. & T. L. C. 1.

is always construed to mean that the settlement shall be so drawn as to give life estates only to the husband and wife successively (m); for it is not to be presumed that the parties meant to put it in the power of the husband to defeat the very object of the settlement, which is to make a provision for the issue of the marriage (n).

- 6. Executory trusts, when construed strictly.—But where the articles show that the parties understood the distinction (as, for instance, where part of the property is limited in strict settlement, and part not), the trust will be construed strictly (o).
- 7. Powers implied in executory trusts.—It would seem that, under a direction to settle on a woman and her children, the usual powers of maintenance and advancement ought to be inserted (p), and also powers of sale and exchange (q). So where marriage articles provide for "powers usually

<sup>(</sup>m) Trevor v. Trevor, 1 P. & W. 622; Streatfield v. Streatfield, 1 W. & T. L. C. 333; Jones v. Langton, 1 Eq. C. Ab. 392; Cusack v. Cusack, 5 Bro. P. C. Tom. ed. 116; Griffith v. Buckle, 2 Vern. 13; Stoner v. Curven, 5 Sim. 268; Davies v. Davies, 4 Beav. 54; Lambert v. Peyton, 8 H. L. Cas. 1.

<sup>(</sup>n) As to the meaning of "issue" in marriage articles, see Nandick v. Wilkes, Gil. Eq. Rep. 114; Burton v. Hastings, ibid. 113; Hart v. Middlehurst, 3 Atk. 371; Maguire v. Scully, 2 Hy. 113; Burnaby v. Griffin, 3 Ves. 206; Horne v. Barton, 19 Ves. 398; Phillips v. James, 2 D. & Sm. 404.

<sup>(</sup>o) Howel v. Howel, 2 Ves. 358; Powel v. Price, 2 P. W. 535; Chambers v. Chambers, 2 Eq. C. Ab. 35, c. 4; Highway v. Banner, 1 Bro. C. C. 584.

<sup>(</sup>p) Re Parrott, Walter v. Parrott, 33 C. D. 274.

<sup>(</sup>q) Wise v. Piper, 13 C. D. 848.

contained in settlements of a like nature," powers of sale, exchange, and reinvestment are authorized (r). So, where a settlement of personalty contains a power to vary investments, and a covenant to settle after-acquired property on similar trusts, a settlement of after-acquired real estate should contain a power of sale, as that is analogous to a power of varying investments of personalty (s). On the other hand, a reference to certain powers, will, it would seem, primâ facie negative any others (t). A direction, in marriage articles, that upon the lady having issue, a certain estate should be strictly settled, was held not to authorize a power to provide portions for younger children (u).

- 8. Construction of executory trusts in wills.—In a will it is obvious that the same presumption will not arise as in the case of marriage articles. Therefore, where a testator gave 300% to trustees, upon trust to lay it out in the purchase of lands, and to settle such lands to the only use of M. and her children, and if M. died without issue, "the land to be divided between her brothers and sisters then living," it was held that this gave M. an estate tail (x).
  - 9. There is, however, no difference between the

<sup>(</sup>r) Duke of Bedford v. M. of Abercorn, 1 M. & C. 312. (s) Elton v. Elton, 27 B. 634; and see Tait v. Lathbury, 1 Eq. 174.

<sup>(</sup>t) See Brewster v. Angell, 1 J. & W. 625.

<sup>(</sup>u) Grier v. Grier, 5 H. L. 688; and see Dod v. Dod, Amb. 274.

<sup>(</sup>x) Sweetapple v. Bindon, 2 Ver. 536.

construction to be put on an executory trust created by marriage articles, and on an executory trust created by will, except so far as the former (by its very nature) furnishes more emphatically the means of ascertaining the intention of those who created the trust (y). In Sackville West v. Viscount Holmesdale, Lady A., by a codicil to her will, declared her intention to be, to give certain real and personal property to trustees, in trust to settle it (as near as might be), with the limitations of the barony of Buckhurst, in such manner as the trustees should consider proper, or as their counsel should advise. The barony was limited to Lady De la Warr for life, with remainder to R., her second son, and the heirs male of his body, with remainder to the third, fourth, and other sons in like manner. It was held, that the property ought not to be settled upon R. in tail like the barony, but that it ought to be limited in a course of strict settlement to R. and other younger sons of Lady De la Warr for their respective lives, with remainder to their sons successively in tail male, in the order mentioned in the patent whereby the barony was created. And Lord Chelmsford said: "The best illustration of the object and purpose of an instrument furnishing an intention in the case of executory trusts, is to be found in the instance of marriage articles, where, the object of the settlement being to make

<sup>(</sup>y) Sackville West v. Holmesdale, 4 H. L. 543; and see also Christie v. Gosling, 1 H. L. 543.

a provision for the issue of the marriage, no words, however strong (which in the case of an executed trust would place the issue in the power of the father), will be allowed to prevail against the implied intention. So, as Sir W. Grant said, in Blackburn v. Stables (z), 'in the case of a will, if it can be clearly ascertained from anything in the will that the testator did not mean to use the expressions which he has employed in their strict technical sense, the court, in decreeing such settlement as he has directed, will depart from his words to execute his intention.' . are cases of executory trusts in wills, where the words 'heirs of the body' have been made to bend to indications of intention that the estate should be strictly settled: and a direction in a will, that a settlement 'shall be made as counsel shall advise,' has been held sufficient to show that the words were not intended to have their strict legal effect (a). . . It appears to me that the words of the codicil express an intention that the barony and the estates should go together to the same person, but not that the limitations of the two should be identical. The word 'correspond' does not mean that the limitations are to be exactly the same, but that they are to be adapted to each other so as to carry out the testatrix's intention that the estate and title should go together. . . If the settlement were

<sup>(</sup>z) 2 V. & B. 367.(a) Bastard v. Proby, 2 Cox, 6.

framed with a limitation in the words of the letters patent, Lord Buckhurst would be able to defeat this intention, and, by converting his estate tail into a fee simple, to separate the estate and the title for ever."

10. So, again, a testator bequeathed money to trustees upon trust to purchase real estate, and settle it upon A. for life without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the heirs of A.'s body, and with a power to jointure. He also devised land to A. upon exactly similar uses. was held, that the testator manifested an intention to give A. a life estate only; and that consequently, in the case of the executory trusts, this intention should be carried out; but that in the case of the devise, that being executed, must be construed according to the rule in Shelley's case (b). In fact, any indication that the first taker is not to take in tail or fee is sufficient; as, for instance, a direction that he is to be unimpeachable for waste, or that he shall not have power to bar the entail, or the like (c).

. 11. A devise (subject to life interest of testator's widow), upon trust to convey, assign, and assure freehold property "unto and to the use of my son T. F., and the heirs of his body lawfully issuing,

<sup>(</sup>b) Papillon v. Voice, 2 P. W. 471; Trevor v. Trevor, 1 H. L. C. 239.

<sup>(</sup>c) See Papillon v. Voice, supra; Leonard v. Lord Sussex, 2 Ver. 526; Thompson v. Fisher, 10 Eq. 207; Parker v. Bolton, 5 L. J., Ch. 88.

but in such manner and form, nevertheless, and subject to such limitations and restrictions, as that if T. F. shall happen to die without leaving lawful issue, then that the property may after his death descend unincumbered unto and belong to my daughter R. F., her heirs, executors, administrators, and assigns":-Held, that the devise was an executory trust to be executed by a conveyance to the use of T. F. during his life, with remainder to his first and other sons and daughters as purchasers in tail, with remainder to R. F. in fee (d).

12. Where strict construction would make trust illegal.—A. devised lands to a corporation in trust to eonvey to A. for life, and afterwards, upon the death of A., to his first son for life, and then to the first son of that first son for life, with remainder (in default of issue male of A.) to B. for life, and to his sons and their sons in like manner. Lord Cowper said, that though the attempt to ereate a perpetuity was vain, yet, so far as was consistent with the rules of law, the devise ought to be complied with; and he directed that all the sons already born at the testator's death should take estates for life, with limitations to their unborn sons in tail (e).

13. Direction to settle on lady and her children. A fund is bequeathed to trustees, upon trust to

<sup>(</sup>d) Thompson v. Fisher, 10 Eq. 207.
(e) Humbertson v. Humbertson, 1 P. W. 332; Williams v. Teale, 6 Ha. 239; Lyddon v. Ellison, 19 B. 565; Peard v. Kekewich, 15 B. 173; but see Blagrove v. Handcock, 18 Sim. 378.

settle it on a lady and her children. In the absence of any indication to the contrary, the proper form of the settlement will be as follows:— A life interest to the lady for her separate use without power of anticipation (f); then a life interest to the husband; then a joint power to the husband and wife to appoint among their children; and, subject thereto (semble) (q), a like power to the survivor (but if the wife be the survivor, the power is to extend to children by a future marriage); and, subject thereto, the fund should be made to go equally to such of the children of the wife as, being sons, attain twentyone, or, being daughters, attain that age or marry; or, in the alternative, to children equally, with gifts over in favour of others, if any of them, being sons, die under twenty-one, or, being daughters, under that age and unmarried (h). It would appear that such a settlement ought also to contain the usual powers of maintenance and advancement, and a power of appointment to the lady in default of issue, with the usual limitations to herself or next of kin in default of appointment(i).

<sup>(</sup>f) Re Parrott, Walter v. Parrott, 33 C. D. 274; Turner v. Sargent, 17 B. 515.

<sup>(</sup>q) See Re Gowan, Gowan v. Gowan, 17 C. D. 778, where, in the case of a fund left to a man until marriage, and then to be settled on his wife and children, such a power was given to him; see also Re Bellasis, 12 Eq. 218.

(h) Cogan v. Duffield, 2 C. D. 44, 49, per Baggallay,

L.J.; and see Re Gowan, Gowan v. Gowan, supra.

<sup>(</sup>i) Re Parrott, Walter v. Parrott, supra, distinguishing

- 14. Direction to settle upon daughters strictly.— Where a testator directed that his daughters' shares should be "settled upon themselves strictly," it was held that the income of each daughter's share should, during the joint lives of herself and husband, be paid to her for her separate and inalienable use; and, if she died first, then her share should go as she should by will appoint, and in default of appointment, to her next of kin (exclusively of her husband); and if she survived, then to her absolutely (k). A direction to strictly settle real estate does not imply that the tenants for life are to be dispunishable for waste (l).
- 15. Direction, on a man's marriage, to settle on his wife and children.—Where a fund was bequeathed to a man until marriage, and then to be settled on his wife and children, and in default of issue to revert to the testatrix's estate; the court directed that the settlement should contain a limitation of the fund to the husband for life, with remainder to the wife for life, with remainder to the children as the husband and wife should jointly appoint, with remainder as the survivor should by deed or will appoint (but if the husband were survivor, he was to have power to appoint amongst his children by a future marriage), with an ultimate remainder to all the children of the husband

Oliver v. Oliver, 10 C. D. 765. See also Nash v. Allen, 42 C. D. 54, where a provision for a second husband was inserted.

<sup>(</sup>k) Loch v. Bagley, 4 Eq. 122.(l) Stanley v. Coulthurst, 10 Eq. 259.

attaining twenty-one, or, in the case of daughters, marrying under that age, and in default of children the fund to fall into the testatrix's residuary estate (m).

16. Departures from ordinary form.-Where, however, there are indications that the settler contemplates a different form of settlement to the above, his wishes will have effect given to them. Thus, in the recent case of Re Parrott, Walter v. Parrott (n), a testator had bequeathed as follows:— "To my daughter A., wife of M. W., I bequeath 10,000l., this amount to be settled upon her for her life, and to be invested for her in good securities, in the names of two or more trustees. At her death, 8,000% of the above sum to be divided equally amongst her children, and the remaining 2,000l. to be given to her husband, if living: if deceased, then the whole amount is to be equally divided amongst her children." It was held by the Court of Appeal that, on the construction of the will, the settlement must be so framed as to make the contingent gift of 2,000%. to "her husband, if living," apply only to M. W., and not to any future husband (o); and also, so as to confine the trusts in favour of the daughter's children, to her children by him. It was further held, that the settlement ought to be framed so as

<sup>(</sup>m) Re Gowan, Gowan v. Gowan, supra, where the form of judgment is given, showing the limitations in full.

<sup>(</sup>n) 33 C. D. 274. (o) But see Nash v. Allen, 42 C. D. 54, where the decision was, on the construction of the will, contra.

to restrain the daughter from anticipating the income, and so as to make the fund divisible only among children who, being sons, should attain twenty-one, or, being daughters, attain that age or marry. It was further held, that the settlement ought to contain the usual powers of maintenance and advancement, and a power of appointment by the daughter in default of children, with the usual limitations to herself or next of kin in default of appointment, but not any power of appointment among the children, as such power would be inconsistent with the direction for equal division.

17. Separate use imported in executory trust.— As a last illustration may be quoted the case of Willis v. Kymer (p). There a testatrix had by her will, after requesting her sister Eliza to perform her wishes as therein expressed, bequeathed various legacies to her brothers and sisters and their children, including a legacy of 3,000% to her brother John for life, "the principal to be divided at his death between his children, John, Sophia, and Mary Ann." The testatrix subsequently made a codicil, whereby she bequeathed to Eliza "all I possess," requesting that at her death she "will leave the sums as I have directed heretofore." Eliza by her will appointed the shares of Sophia and Mary Ann to them to their separate use, and the question then arose whether she could do so; and Sir George Jessel, M. R., said, "I am of opinion that Eliza had power to attach a limitation

<sup>(</sup>p) 7 C. D. 181.

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to separate use. . . . The original will and codicil say nothing about separate use. They merely direct her to leave the money after her brother's death to his children, and nothing more. She is therefore bound not to make a different disposition. Well, she has conformed to that direction by leaving the money to the children, and, in doing so, has taken care to dispose of it in such a manner that the shares of the daughters shall, in case of their marriage, still remain for their own benefit, thus effectually carrying out her sister's intention.

18. Cross remainders implied.—A testator directed his trustees to purchase lands in counties of N. and D., to be settled, on the death of the eldest son of J. S. without issue (which happened), to the use of every son of J. S. then living or who should be born in testator's lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son and his assigns to receive the rents during his life, and after his decease to the use of such son's first and every other son successively in tail male, and on failure of such issue, to the use of the testator's right heirs:—Held, that the younger sons of J. S. took as tenants in common for life, with remainder as to each son's share to his first and other sons in tail male, with cross remainders over (q).

<sup>(</sup>q) Surtees v. Surtees, 12 Eq. 400.

# Division III. CONSTRUCTIVE TRUSTS.

#### CHAPTER I.—Introduction.

ART. 20. Analysis of Constructive Trusts.

#### CHAPTER II.—RESULTING TRUSTS.

- ART. 21. Where Equitable Interest not wholly disposed of.
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# CHAPTER III.—CONSTRUCTIVE TRUSTS WHICH ARE NOT RESULTING.

- Art. 25. Constructive Trusts of Profits made by Fiduciary Persons.
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#### CHAPTER I.

#### INTRODUCTION.

- \*ART. 20.—Analysis of Constructive Trusts.
  - (1) Constructive trusts are either resulting trusts (in which the equitable interest springs back or results to a

settlor or his representatives), or non-resulting trusts.

(2) Resulting trusts arise in the three following cases, viz.:—

- $\alpha$ . When a legal estate is given to another, but the equitable interest is not, or is only partially disposed of (a).
- β. When the equitable interest is disposed of in a manner which the law will not permit to be carried out (b).
- $\gamma$ . When a purchase has been made in the name of some other person than the real purchaser (c).
- (3) Constructive trusts which are not resulting arise:—
  - $\alpha$ . When some person holding a fiduciary position has made a profit out of the trust property (d).
  - β. In all other cases where there is no express trust, but the legal and equitable estates in property are nevertheless not co-equal and united in the same individual (e).

<sup>(</sup>a) Art. 20.

<sup>(</sup>b) Art. 22.

<sup>(</sup>c) Art. 23.

<sup>(</sup>d) Art. 25. (e) Art. 26.

#### CHAPTER II.

#### RESULTING TRUSTS.

ART. 21. Where Equitable Interest not wholly disposed of.

22. Where Trusts declared are Illegal.

23. Where Purchase made in another's Name.

24. To whom Property results.

### ART. 21.—Where Equitable Interest not wholly disposed of.

(1) When property is given to a person, and it appears to have been the probable intention of the donor (a) that the donee was not to take it beneficially, there will be a resulting trust in favour of the donor or his representatives in the following cases, viz.:-

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- α. If the instrument is either silent as to the way in which the beneficial interest is to be applied; or
- β. If it directs that it shall be applied for a particular purpose (as distin-

<sup>(</sup>a) Per Lord Hardwicke, Hill v. Bishop of London, 1 Atk. 620; Walton v. Walton, 14 V. 322; King v. Denison, 1 V. & B. 279.

guished from a mere subjection to such purpose(b)) which turns out to be insufficient to exhaust the property; or

y. If an express trust cannot be carried into effect (c).

(2) Where the non-beneficial character of the gift appears on the face of the instrument, no evidence to the contrary is admissible (d). But where it is merely presumed from the general scope of the instrument, parol evidence is (at all events in the case of gifts inter vivos) admissible, both in aid and in contradiction of the presumption (e).

ILLUST.—1. Devise to trustees eo nomine.—Thus, where real estate was devised to "my trustees,"

<sup>(</sup>b) See 1 Jarm. 533; Watson v. Hayes, 5 M. & C. 125; Wood v. Cox, 2 M. & C. 684; and Cunningham v. Foot, 3 App. Cas. 974.

<sup>(</sup>c) Stubbs v. Sargou, 3 M. & C. 507; Ackroyd v. Smithson, 1 B. C. C. 503.

<sup>(</sup>d) See Langham v. Sandford, 17 V. 442; Irvine v. Sullivan, 8 Eq. 673.

<sup>(</sup>e) 29 Car. II. c. 3, s. 8; Gascoigne v. Thwing, 1 Ver. 366; Willis v. Willis, 2 Atk. 71; Cook v. Hutchinson, 1 Ke. 42. As to parol evidence explanatory of a testator's intention, see Docksey v. Docksey, 2 Eq. C. A. 506; North v. Crompton, 1 Ch. Ca. 196; Walton v. Walton, 14 V. 322; Langham v. Sandford, supra; Lynn v. Beaver, T. & R. 66; and Biddulph v. Williams, 1 C. D. 203.

but no trusts were declared in relation to it, it was held that the trustees must hold it in trust for the testator's heir. For by the expression "trustees," unexplained by anything else in the instrument (f), all notion of a beneficial interest being intended in their favour was excluded (g).

- 2. Devise upon trusts not declared.—A testator devised and bequeathed all his estate and effects to A. and B., their heirs, executors, and administrators, upon trust to convert his personal estate, and to stand possessed of the proceeds and of the residue of his estate and effects, upon trusts only applicable to personalty. It was held that the real estate of the testator passed to the trustees by the use of the word "devise" in the gift, and the word "heirs" in the limitation; but that as the trusts were rigidly and exclusively applicable to personal property, and as the trustees had been designated by that name, and so could not take beneficially, there was a resulting trust of the real estate in favour of the settlor's heirs (h).
- 3. Lands vested in trustee, no trust within Statute of Frauds.—Where lands have been conveyed to a trustee, and the trusts have not been

<sup>(</sup>f) As, for instance, if the expression is used with reference to one only of two separate funds. Bateley v. Windle, 2 B. C. C. 31; Pratt v. Sladden, 14 V. 193; Gibbs v. Rumsey, 2 V. & B. 294.

<sup>(</sup>g) Dawson v. Clark, 18 V. 247; Barrs v. Fewkes, 2 H. & M. 60; and see Elcock v. Mapp, 3 H. L. Cas. 492.

<sup>(</sup>h) Longley v. Longley, 13 Eq. 133; Dunnage v. White, 1 J. & W. 583; Lloyd v. Lloyd, 7 Eq. 458; comp. D'Almaine v. Moseley, 1 Dr. 629; Coard v. Holdernesse, 20 B. 147.

manifested and proved by a signed writing in accordance with the Statute of Frauds, there will be a resulting trust to the settlor (i).

- 4. Uncertainty or failure of express trust.—So, if a declared trust is too uncertain or vague to be executed (k), or fails by lapse (l) or otherwise, then, as it is expressed on the face of the instrument that the trustee was not intended to take beneficially, there will be a resulting trust.
- 5. Voluntary grants.—Real property is granted to another, either without any consideration at all, or for a merely nominal one (m). If no trust is declared of any part of it, and the grant is to a stranger, and no intention of passing the beneficial interest appears either by the instrument, or by parol or other evidence (n), the law presumes that the probable intention of the grantor was not to confer a benefit (o), and accordingly looks upon the grantee as a trustee for the grantor or his representatives.

<sup>(</sup>i) Rudkin v. Dolman, 35 L. T. 791; or Statute of Wills; Re Boyes, 26 C. D. 531; and Re King, 21 L. R. Ir. 273.

<sup>(</sup>k) Stubbs v. Sargon, 2 Ke. 255; Morice v. Bishop of Durham, 9 V. 399, and 10 V. 522; Kendal v. Granger, 5 B. 300.

<sup>(</sup>l) Ackroyd v. Smithson, 1 B. C. C. 503; Spink v. Lewis, 3 B. C. C. 355; or becomes in the event too remote; Tregonwell v. Sydenham, 3 Dow. 194, 210.

<sup>(</sup>m) Hayes v. Kingdome, 1 Ver. 33; Sculthorpe v. Burgess, 1 V. jun. 92.

<sup>(</sup>n) Cook v. Hutchinson, 1 Ke. 42, 50.

<sup>(</sup>o) Sculthorpe v. Burgess, supra; and see Hutchins v. Lee, 1 At. 447. As to grants to wife or children, see art. 23.

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6. But where the gift is of chattels, it would seem that an intention to confer beneficially would be presumed, on the ground of the utter fatuity of the proceeding on any other supposition (p). But this presumption is, of course, rebuttable by evidence (q).

7. Residue after satisfaction of express trust.— Where there is a devise to A. upon trust to pay debts or to answer an annuity, there is a resulting trust of what remains, after payment of the debts or satisfaction of the annuity (r). And on similar principles, where there was a trust for a widower until he should die or marry again, and upon his death the property was to be held in trust for his children (the will not saying what was to be done with it in the event of his second marriage), it was held that upon his marrying again there was a resulting trust of the income in favour of the settlor's next of kin during the residue of the widower's life (s).

8. But in a recent case, where debtors assigned their property to trustees, in trust to sell, and divide the proceeds amongst their creditors in rateable proportions according to the amounts of their respective debts, it was held by the House of Lords that there was no resulting trust in favour of the debtors, in the event of there being more

Brown, 12 C. D. 872.

 <sup>(</sup>p) George v. Howard, 7 Pr. 651.
 (q) Custance v. Cunninghame, 13 B. 363.

<sup>(</sup>r) King v. Dennison, 1 V. & B. 279; Watson v. Hayes, supra. But see contra Croome v. Croome, 61 L. T. 814. (s) Gowan v. White, 60 L. T. 931; and see Upton v.

than sufficient to pay twenty shillings in the pound (t). This decision was, however, founded entirely on the construction of the particular deed, and turned apparently, to some extent, upon the fact that all the best precedents contained an express trust (u) of any surplus in favour of the debtors. It must, therefore, not be rashly assumed that the same decision would be arrived at if, on the language of another creditor's deed, it appeared that the object was to pay debts (or a dividend on debts), and not to assign the property for better or for worse by way of accord and satisfaction.

9. Where under a similar assignment to that mentioned in the last illustration, there is not enough to pay all the creditors in full, any unclaimed dividends must be applied in augmenta-

(t) Smith v. Cooke, (1891) 1 App. Cas. 297. It is difficult, if not impossible, to reconcile this case with Green v. Wynn, 4 Ch. App. 204, which does not seem to have been

quoted to their lordships.

<sup>(</sup>u) Lord Halsbury spoke, in his judgment, of it being the "ordinary and familiar method in such cases to express a resulting trust on the face of the instrument." This phrase has given rise to much comment in technical circles, as a resulting trust, in the sense attributed to the term by equity lawyers, only arises in the absence of an express one. It is, however, sufficiently obvious that what his lordship meant was, that if it were intended to have an ultimate trust springing back (i. e., resulting) to the debtor, the familiar mode of doing so was by saying so on the face of the instrument, and not leaving it to be implied. He was, in fact, using the phrase "resulting trust," not in the narrow technical sense of a constructive resulting trust, but in the wider, original etymological sense, of a trust (whether express or implied), springing back, or resulting, to its creator.

tion of the dividends of the creditors who do claim (v).

- 10. Total failure of consideration for express trust.—So where a settlement is executed in contemplation of a marriage which is subsequently broken off, there is a total failure of the consideration on which the settlement was based, and the property results to the settlor (z).
- 11. No resulting trust where it appears that donee was to take beneficially.—But where (a) one made his will and thereby gave 51, to his brother (who was also his heir-at-law), and made and constituted his "dearly beloved wife" his "sole heiress and executrix" of all his lands and real and personal estate, to sell and dispose thereof at her pleasure, and to pay his debts and legacies, it was held, that the wife was entitled to the real estate for her own benefit, and that there was no resulting trust to the heir. The ground of this decision was, that the direction that the wife should be sole heiress, did in every respect place her in the stead of the heir-at-law, and not as trustee for him, and that this was "rendered plainer by reason of the language of tenderness and affection which must intend to her something beneficial, and not what would be a trouble only;" in addition to which the heir was not forgotten, but had 51, left him.

<sup>(</sup>y) Wild v. Banning, 2 Eq. 577.
(z) Essery v. Cowlard, 26 C. D. 191.
(a) Rogers v. Rogers, 3 P. W. 193; and see Croome v. Croome, 61 L. T. 814.

12. Charge does not imply resulting trust of residue.—And so under a devise to A., charged with the payment of debts and legacies (b), or charged with the payment of a contingent legacy (c) which does not take effect, there will be no resulting trust, but the whole property will go to the devisee beneficially, subject only to the charge. And the same result will follow even where property is devised to A. "upon trust" to pay specific legacies, if on the whole will it appears that the testator merely meant to charge the legacies on the property (d).

ART. 22.—Resulting Trusts, where Trusts declared are Illegal.

> When a person has intentionally vested property in another for an illegal purpose, then, (if the trustee expressly relies (e) upon the maxim "in pari delicto, potior est conditio possidentis,") the settlor cannot recover it back (f), except in the following cases, in each

<sup>(</sup>b) King v. Dennison, supra; Wood v. Cox, supra.
(c) Tregonwell v. Sydenham, 3 Dow. 210.
(d) Croome v. Croome, 61 L. T. 814.

<sup>(</sup>e) Haigh v. Kaye, 7 Ch. App. 469. (f) Duke of Bedford v. Coke, 2 V. sen. 116; Curtis v. Perry, 6 .V. 739; Cottington v. Fletcher, 2 At. 156; Brackenbury v. Brackenbury, 2 J. & W. 391; Taylor v. Chester, 4 Q. B. 309; Ayerst v. Jenkins, 16 Eq. 275.

of which there will be a resulting trust, namely:—

- a. Where the illegal purpose is not carried into execution (g).
- β. Where the effect of allowing the trustee to retain the property might be to effectuate an unlawful object, to defeat a legal prohibition, or to protect a fraud (h).

ILLUST.—1. Fraudulent conveyance.—Thus, in Symes v. Hughes (i), the plaintiff, being in pecuniary difficulties, assigned certain leasehold property to a trustee with the view of defeating his creditors. Two and a-half years afterwards he was adjudicated bankrupt, but obtained the sanction of his creditors, under sect. 110 of the Bankruptcy Act, 1861, to an arrangement, by which his estate and effects were re-vested in him, he covenanting to prosecute a suit for the recovery of the assigned property, and to pay a composition of

(g) Symes v. Hughes, 9 Eq. 475; Childers v. Childers, 1 D. & J. 482; Davies v. Otty, 35 B. 208; Birch v. Blagrave, Amb. 264; Platamore v. Staple, G. Coop. 250.

<sup>(</sup>h) See per Lord Selborne in Ayerst v. Jenkins, 16 Eq. 283; and see per Knight-Bruce, L.J., in Reynell v. Spry, 1 De G., M. & G. 660, where he said: "Where the parties are not in part delicto, and where public policy is considered as advanced by allowing either party, or at least the more excusable of the two, to sue for relief, relief is given to him." And see also, to same effect, Law v. Law, 3 P. W. 393, and St. John v. St. John, 11 V. 535.

<sup>(</sup>i) Supra.

two and sixpence in the pound to his creditors, in case his suit should prove successful. Lord Romilly, M.R., in delivering judgment, said: "The assignment was made for an illegal purpose, and it is said that, such being the case, the court will not interfere. I think the correct answer to this was given by Mr. Southgate, namely, that where the purpose for which the assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it."

- 2. Conveyance to avoid forfeiture for felony.—So, again, the plaintiff, being apprehensive of an indictment for bigamy (conviction for which involved forfeiture of property), conveyed his real estate to the defendant, on a parol agreement to re-transfer when the difficulty should have passed over. It subsequently transpired that the plaintiff was not liable to be indicted, and thereupon he filed a bill praying for a re-transfer of his property. It was held, that although there was no express trust, (inasmuch as there was no written proof of it,) yet there was a resulting trust to which the statute did not apply; and as there was no illegality in fact, but only in intention, the court ordered the transfer prayed for (k).
  - 3. Conveyance to escape serving as sheriff.—And

<sup>(</sup>k) Davies v. Otty, supra.

where a father conveyed the legal estate in property to his daughter, with the intention of thus escaping from serving as sheriff, but afterwards repented, and paid the fine, Lord Hardwicke said: "I am of opinion that the conveyance ought not to take effect against his intention unless he had actually taken the oath" that he had not the requisite qualification (1).

- 4. Attempt to evade rule against perpetuities.— Where a settlor attempts to settle property so as to contravene the policy of the law with regard to perpetuities, such trusts will not only not be carried into effect, but the person nominated to carry them out is held to be a mere trustee for the settlor or his representatives. For the attempt was made either through ignorance or carelessness, or else with a direct intention to contravene the law. In the former case, as there would be no delictum, the usual maxim would not apply. In the latter, equity would not allow the trustee to retain the property and so put it in his power to carry out the illegal intentions of the testator, and to defeat the policy of the law (m).
- 5. Attempt to evade Mortmain Acts.—And so again, where lands, or the proceeds of land, were devised to charitable uses, or were devised to one who was under a secret agreement with the testator pledged to apply them to charitable purposes, then, notwithstanding the improper intentions of

(l) Birch v. Blagrave, supra. (m) Carrick v. Errington, 2 P. W. 361; Tregonwell v. Sydenham, 3 Dow. 194; Gibbs v. Rumsey, 2 V. & B. 294. the testator, there was a resulting trust. For the result of allowing the gift to stand would probably have been to effect an object prohibited by law (n). But of course this is no longer so since the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73.)

6. Conveyance to qualify for game licence.—And where a father granted land to his son, in order to give him a colourable qualification to shoot game under the old game laws, and without any intention of conferring any beneficial interest upon him, the court would not enforce any resulting trust in favour of the father. For he and the son were in pari delicto, and there was no detriment to the public in allowing the son to retain the estate (o). Of course, if there had been no illegality (if, for instance, a bare legal estate had been a sufficient qualification), there would have been a resulting trust (p).

7. Settlement for immoral consideration.—In Ayerst v. Jenkins (q), a widower, two days before going through the ceremony of marriage with his deceased wife's sister (which ceremony was known to both parties to be invalid), executed a settlement. By this instrument it was recited that he was desirous of making a provision for the lady, and had transferred certain shares into the names of

<sup>(</sup>n) Arnold v. Chapman, 1 V. sen. 108; Addlington v. Cann, Barn. 130; Springett v. Jennings, 10 Eq. 488; but see Rowbotham v. Dunnett, 8 C. D. 430.

<sup>(</sup>o) Brackenbury v. Brackenbury, 2 J. & W. 391.

<sup>(</sup>p) Childers v. Childers, 1 D. & J. 482. (q) 16 Eq. 283.

trustees, upon the trusts thereinafter declared. being for the separate and inalienable use of the lady during her life, and after her death as she should by deed or will appoint. They afterwards lived together as man and wife until the widower's death. Some time afterwards, his personal representatives instituted a suit to set aside the settlement, on the ground that it was founded on an immoral consideration. Lord Selborne, however, said: "Relief is sought by the representative, not merely of a particeps criminis, but of a voluntary and sole donor, on the naked ground of the illegality of his own intention and purpose, and that, not against a bond or covenant or other obligation resting in fieri, but against a completed transfer of specific chattels, by which the legal estate in those chattels was absolutely vested in trustees for the sole benefit of the defendant. I know of no doctrine of public policy which requires or authorizes a court of equity to give assistance to such a plaintiff under such circumstances. When the immediate and direct effect of an estoppel in equity against relief to a particular plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy. But the voluntary gift of part of his own property by one particeps criminis to another, is in itself neither fraudulent nor prohibited by law; and the present is not the case of a man repenting of an immoral purpose before it is too late, and seeking to recall, while the object is yet unaccomplished (r), a gift intended as a bribe to iniquity. If public policy is opposed, as it is, to vice and immorality, it is no less true, as was said by Lord Truro in Benyon v. Nettlefold (s), that the law in sanctioning the defence of particeps criminis does so on the grounds of the public policy,—namely, that those who violate the law must not apply to the law for protection." The practitioner must, however, carefully bear in mind, that where property is transferred to trustees in trust for the settlor until an intended marriage with his deceased wife's sister is solemnized, and then in trust for the lady and the issue of the marriage, the trust will be void, inasmuch as such a marriage cannot take place (t).

ART. 23.—Resulting Trusts where Purchase made in Another's Name.

When real or personal property (u) is taken in the names of the purchaser and others generally, or in the names of others without that of the purchaser, or in one name, or in several, and whether jointly or successively,

<sup>(</sup>r) As in Symes v. Hughes, supra.(s) 3 M. & G. 102.

<sup>(</sup>t) Pawson v. Brown, 13 C. D. 202.

<sup>(</sup>u) Dyer v. Dyer, 2 Cox., 93; Ebrand v. Dancer, 2 Ch. Ca. 26; Wheeler v. Smith, 1 Giff. 300.

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there is a primâ facie presumption of a resulting trust in favour of the person who (by parol(x) or other evidence) is proved to have advanced the purchase-money (y) in the character of purchaser (z). But this presumption may be rebutted—

a. By parol (u) or other evidence;

3. By the fact that the person in whose name the purchase was made was the wife (b) or child of the purchaser (c), or was some person towards whom he stood in close relationship, and in loco parentis(d), or was trustee of a settlement by which the purchaser has previously settled property (e). In any of these cases a primâ facie presumption

(y) Dyer v. Dyer, supra; Wray v. Steele, 2 V. & B. 388.(z) Bartlett v. Pickersgill, supra.

(c) Soar v. Foster, 4 K. & J. 152; Beckford v. Beckford, Lofft, 490.

(e) Re Curteis, 14 Eq. 220.

<sup>(</sup>x) 29 Car. II. c. 3, s. 8; Bartlett v. Pickersgill, 1 Ed. 515; Ryall v. Ryall, 1 Atk. 59; Leach v. Leach, 10 Ves. 517.

<sup>(</sup>a) Rider v. Kidder, 10 V. 360; Standing v. Bowring, 31 C. D. 282.

<sup>(</sup>b) Re Eykin, 6 C. D. 115; Drew v. Martin, 2 H. & M.

<sup>(</sup>d) Beckford v. Beckford, supra; Currant v. Jago, 1 Coll. 261; Tucker v. Burron, 2 H. & M. 515; Forrest v. Forrest, 13 W. R. 380.

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will arise that the purchaser intended the ostensible grantee or grantees to take absolutely. But this last presumption is also capable of being rebutted by evidence, or by surrounding circumstances (f).

ILLUST.-1. No resulting trust where purchasemoney only lent.—If one pay the purchase-money at the request of and by way of loan to the person in whose name the property is taken, there will be no resulting trust. For the lender did not advance the purchase-money as purchaser (g), but merely as a lender.

2. Where purchase-money furnished by two persons.—Where the purchase-money is advanced, partly by the person in whose name the property is taken, and partly by another, then, if they advance it in equal shares, they will (in the absence of evidence or circumstances showing a contrary intention (h) ) take as joint tenants, because the advance being equal the interest is equal; but if in unequal shares, then a trust results to each of them, in proportion to his advance (i). The call a large a con-

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<sup>(</sup>f) Tunbridge v. Cane, 19 W. R. 1047; Williams v. Williams, 32 B. 370.

<sup>(</sup>g) Bartlett v. Pickersgill, supra; and see also Aveling v. Knipe, 19 Ves. 441.

<sup>(</sup>h) See Robinson v. Preston, 4 K. & J. 505; Edwards v. Fashion, Pr. Ch. 332; Lake v. Gibson, 1 Eq. Ca. Ab. 290; u i fre Bone v. Polland, 24 Bea. 288.

<sup>1.</sup> J. at a comment of the contract of the cont (i) Lake v. Gibson, 1 Eq. Ca. Ab. 291; Rigden v.

- 3. Advancement of Son.—In Crabb v. Crabb (k), a father transferred a sum of stock from his own name into the joint names of his son and of a broker, and told the latter to carry the dividends to the son's account. The father, by a codicil to his will executed subsequently, bequeathed the stock to another; but it was held that the son took absolutely. The Master of the Rolls said: "If the transfer is not ambiguous, but a clear and unequivocal act, as I must take it on the authorities, for explanation there is no place; if then it cannot be permitted to explain, still less can it be allowed to qualify the operation of the previous act. The transfer being held an advancement, nothing contained in the codicil, nor any other matter ex post facto, can ever be allowed to alter what had been already done." In short, a resulting trust will not be allowed to arise, merely because a donor subsequently changes his mind and repents him of his generosity.
- 4. Augmentation of settled property.—Again, a sum of consols was vested in the trustees of a marriage settlement upon the usual trusts. The husband directed the bankers who received the dividends (and paid them to him as tenant for life under a power of attorney from the trustees). to invest an additional sum of 2,0001. consols in the names of the same trustees, so that they might receive the dividends as before. This was done.

<sup>(</sup>k) 1 M. & K. 511; and see also Birch v. Blagrave, Amb. 264; Standing v. Bowring, 31 C. D. 282; and Batstone v. Salter, 10 Ch. App. 431, where a mother transferred stock into the joint names of herself, her daughter, and her son-in-law.

and the husband received the income of the whole during his life. No notice of the new investment was ever given to the trustees. It was held that there was no resulting trust of the 2,000%, for the husband, but that it became subject to the trusts of the settlement as an augmentation of the trust fund (1).

5. Evidence of intention to benefit.—In the recent case of Standing v. Bowring (m) the facts were as follows:-The plaintiff, a widow, in the year 1880 transferred 6,000% consols into the joint names of herself and her godson, the defendant. This she did with the express intention that the defendant, in the event of his surviving her, should have the consols; but that she herself should retain the dividends during her life. She had been previously warned that her act was irrevocable. It was held that the plaintiff could not claim a retransfer under the doctrine of constructive trust, the evidence clearly showing that she did not, when she made the transfer, intend to make the defendant a mere trustee for her except as to the dividends. In delivering judgment, Cotton, L. J., said: "Though the defendant was the nephew of the first husband of the plaintiff, she was not in loco parentis to him, and the rule is well settled that where there is a transfer by a person into his own name jointly with that of a person who is not his child, or his adopted

<sup>(</sup>l) Re Curteis, 14 Eq. 220. (m) 31 C. D. 282; and see also Fowkes v. Pascoe, 10 Ch. App. 343.

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child, then there is primâ facie a resulting trust for the transferor. But that is a presumption capable of being rebutted, by showing that, at the time, the transferor intended a benefit to the transferee; and in the present case there is ample evidence that at the time of the transfer, or for some time previously, the plaintiff intended to confer a benefit, by this transfer, on her late husband's godson."

6. Rebutting evidence of advancement.—But a declaration made by the father at or before the date of the purchase is admissible to rebut the presumption, although it might not be good as a declaration of trust, on account of its not being reduced into writing. For, "as the trust would result to the father were it not rebutted by the sonship as a circumstance of evidence, the father may counteract that circumstance by the evidence arising from his parol declaration" (n).

7. Surrounding circumstances may also tend to rebut the presumption. Thus, a father, upon his son's marriage, gave him a considerable advancement, having several younger children who had no provision. He subsequently sold an estate, but 500% only of the purchase-money being paid, he took a security for the residue in the joint names of himself and his said son. He himself, however, received the interest, and a great part of the principal without any opposition from the son, as did his executrix after his death, the son writing receipts for the interest. Under these circum-

<sup>(</sup>n) Williams v. Williams, 32 B. 370.

stances it was held that the son took nothing; the Lord Chancellor saying: "Where a father takes an estate in the name of his son, it is to be considered as an advancement; but that is liable to be rebutted by subsequent acts. So if the estate be taken jointly, so that the son may be entitled by survivorship, that is weaker than the former case, and still depends on circumstances. The son knew here that his name was used in the mortgage, and must have known whether it was for his own interest or only as a trustee for the father; and instead of making any claim, his acts are very strong evidence of the latter; nor is there any colour why the father should make him any further advancement when he had so many children unprovided for "(o). The dictum of the learned Chancellor, that the presumption may be rebutted by subsequent acts, cannot be taken to mean subsequent acts of the father, which are only admissible against, and not for, him (p); but must, it is apprehended, refer only to subsequent acts of the son (and only to them when there is nothing to show that the father did actually intend to advance the son (q); or to subsequent acts of the father so acquiesced in by the son as to raise the presumption that the son always knew that no benefit was intended for him. It is also to be

<sup>(</sup>o) Pole v. Pole, 1 V. sen. 76; Stock v. McAvoy, 15 Eq. 55; Bone v. Polland, 24 B. 283; and Marshall v. Crutwell, 20 Eq. 328.

<sup>(</sup>p) Reddington v. Reddington, 3 Ridge, 197.
(q) Sidmouth v. Sidmouth, 2 B. 455; Hepworth v. Hepworth, 11 Eq. 10.

remarked, that the fact of the father having previously made provision for the son, would not of *itself* have been sufficient to rebut the usual presumption, although taken together with other circumstances, it was a strong link in the chain (r).

- 8. So the relationship of solicitor and client between the son and the parent has been considered a circumstance that will, of itself, rebut the presumption of advancement (s).
- 9. Whether presumption of advancement by married woman. - In Re De Visme (t) it was laid down, that where a married woman had, out of her separate estate, made a purchase in the name of her children, no presumption of advancement arose, inasmuch as a married woman was under no obligation to maintain her children. This case was followed by the late Sir George Jessel, M. R., in Bennet v. Bennet (u), where a mother was entitled to property under the Married Women's Property Act, 1870, by which married women were made as liable as widows for the maintenance of their children. The late M. R., however, gave it as his opinion, that the presumption of intention to advance, depended, not on the liability to maintain, but on the moral obligation on the part of a father to provide a provision or fortune for a child, and that there was no such obligation recognized on the part of a mother. If that be so, the law

<sup>(</sup>r) See per Lord Loughborough, 3 Ridge, 190.
(s) Garrett v. Wilkinson, 2 D. & S. 244, sed quære.

<sup>(</sup>t) 2 De G., J. & S. 17. (u) 10 C. D. 474.

still remains the same, notwithstanding that the Married Women's Property Act, 1882, renders a wife as liable for the maintenance of her children as a husband is. However, it is conceived that the point is still an open one, as Sir George Jessel's judgment is admittedly in direct conflict with that of the late V.-C. Stuart in Sayre v. Hughes (x); where the presumption of intention to benefit, was based by the V.-C. rather on motive than on duty. His lordship said:—"It has been argued that a mother is not a person bound to make an advancement to her child, and that a widowed mother is not a person standing in such a relation to her child as to raise a presumption that in a transaction of this kind a benefit was intended for the child. In the case of Re De Visme it was said, that a mother does not stand in such a relationship to a child as to raise a presumption of benefit for the child. The question in that case arose on a petition in lunacy, and it seems to have been taken for granted that no presumption of benefit arises in the case of a mother. But maternal affection as a motive of bounty is perhaps the strongest of all, although the duty is not so strong as in the case of a father, inasmuch as it is the duty of a father to advance his child. That, however, is a moral obligation, and not a legal one." On the whole, it is with much diffidence conceived that if the authorities should hereafter come

<sup>(</sup>x) 5 Eq. 376. This was the case of a widowed mother, but the principle appears to be the same.

under review, the views of the late V.-C. Stuart would be found to have as much to be said in their favour as those of the late M. R. Neither judge bases the presumption on legal obligation. Both admit that the presumption is founded on a moral presumption of intention. But if so, surely there is as much moral presumption of an intention by a mother to benefit her offspring, as there is in the case of a father; and if neither law nor equity imposes any obligation on a father to advance his child, it is difficult to see on what principle an equity judge should invent an imperfect obligation of this kind as a foundation for a presumption of intention to benefit, while at the same time rejecting a similar moral obligation on the part of a wealthy mother. In reason and in custom, there is assuredly as much obligation on the part of a mother who has the command of money, to benefit her children with it, as there is in the case of a father.

It must in any case be borne in mind, that even if the view of Jessel, M. R., be the correct one, yet if it be proved *aliunde* that the mother did in fact intend to benefit her offspring, there will be no resulting trust (y).

10. Advancement by persons in loco parentis.— With regard to the presumption of advancement in favour of persons to whom the purchaser stands in loco parentis, it has been held that the presumption arose in the case of an illegitimate

<sup>(</sup>y) Beecher v. Major, 2 Dr. & Sm. 431.

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child (z), a grandchild when the father was dead (a), and the nephew of a wife who had been practically adopted by the husband as his child (b). But it would seem that the person alleged to have been in loco parentis must have intended to put himself in the situation of the person described as the natural father of the child with reference to those parental offices and duties which consist in making provision for a child. The mere fact that a grandfather took care of his daughter's illegitimate child and sent it to school, has been held to be insufficient to raise the presumption, Vice-Chancellor Page-Wood saying:-"I cannot put the doctrine so high as to hold that if a person educate a child to whom he is under no obligation either morally or legally, the child is therefore to be provided for at his expense" (c).

# ART. 24.—To whom Property results.

α. Where a resulting trust arises under an instrument inter vivos the beneficial interest results to the settlor himself (d).

<sup>(</sup>z) Beckford v. Beckford, Lofft, 490; Kilpin v. Kilpin, 1 M. & K. 542, sed quære, 4 K. & J. 157. (a) Ebrand v. Dancer, 2 Ch. Ca. 26.

<sup>(</sup>b) Currant v. Jago, 1 Coll. Ch. 261.

<sup>(</sup>c) Tucker v. Burron, 2 H. & M. 515; and see per Jessel, M. R., Bennet v. Bennet, 10 C. D. p. 477.

<sup>(</sup>d) Symes v. Hughes, 9 Eq. 475; Davies v. Otty, 35 B. 208.

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- E. Where the instrument is a will, the property results to the heir or devisee of the testator, if real estate, or to the residuary legatees or next of kin, if personal estate (e), whether the will contains a direction for conversion or not(f).
- 7. Where a resulting trust has once arisen under an instrument which directs a conversion, and the person to whom it results dies before getting it in, then as between his real and personal representatives it devolves (whether actually converted at the date of his death or not) as if it were actually converted, unless the trust for conversion has wholly failed (g).

ILLUST .- 1. Resulting trust under marriage settlement.—By a marriage settlement, real estate of the husband, and personal estate of the wife, is vested in trustees, in trust for the husband for life, with remainder in trust for the wife for life, with remainder upon the usual trusts in favour of the

(f) Curteis v. Wormald, 10 C. D. 172; Ackroyd v. Smithson, supra.

<sup>(</sup>e) Ackroyd v. Smithson, 1 W. & T. Lead. Cas. 949, and cases there cited.

<sup>(</sup>g) Re Richerson, Scales v. Heyhoe, (1892) 1 Ch. 379; Curteis v. Wormald, supra; Cogan v. Stevens, 5 L. J. Ch. 17.

issue of the marriage, without any gift over in default of issue. Upon the death of the wife without issue, the real estate will result to the husband; and similarly on the death of the husband without issue, the personal estate will result to the wife.

- 2. Resulting trust under will where no conversion directed.—A. by his will gives his real estate unto and to the use of trustees, and his personal estate to them absolutely, upon trust for certain persons for life, with an ultimate remainder in trust for the testator's two nephews B. and C. as tenants in common. B. dies in the testator's lifetime. His share of the real estate will result to the testator's heir or residuary devisee, and his share of the personalty to the testator's next of kin or residuary legatees.
- 3. Resulting trust where conversion directed.—
  The preceding examples speak for themselves, and require no comment. But the following case presents at first sight more difficulty. A testator devises real estate to trustees, upon trust to sell and divide the proceeds between his nephews B. and C. If B. should die in the testator's lifetime, his share of the proceeds of the sale will lapse and result to the testator's heir or residuary devisee, and not to his next of kin or residuary legatees, although it is pure personalty. The principle on which this proceeds (settled by the leading case of Ackroyd v. Smithson (h)) is, that conversion

<sup>(</sup>h) 1 W. & T. Lead. Cas. 949.

directed by a will is presumed to be only intended for the purposes therein expressed; and so far as these purposes fail, equity presumes that the testator did not intend to rob his real representatives of property which, but for those objects, would have been theirs, and to give such property to his personal representatives, whose only possible ground of claim arises from the fact that the testator's expressed intentions have been disappointed (i).

4. The question was explained with his customary lucidity by the late Sir George Jessel in the ease of Curteis v. Wormald (k). There, personal estate had been bequeathed upon trust to purchase real estate, which was to be held on trusts, some of which eventually failed. It was held, that land, purchased before the failure, resulted in favour of the testator's next of kin, and not his heir. M.R., in giving judgment, after stating the facts, said: "The limitations took effect to a certain extent, and then, by reason of the failure of issue of the tenants for life, the ultimate limitations failed, and there became a [resulting] trust for somebody. Now for whom? According to the doctrine of the Court of Equity, this kind of conversion is a conversion for the purposes of the will,

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(k) 10 C. D. 172.

<sup>(</sup>i) This presumption is not even rebutted by a declaration that the proceeds of the sale of realty are to be personalty for all purposes; the latter words being construed as all purposes of the will (Shallcross v. Wright, 12 B. 505; Taylor v. Taylor, 3 D., M. & G. 190; and see also Fitch v. Webber, 6 Ha. 145).

and does not affect the rights of the persons who take by law independent of the will. If, therefore, there is a trust to sell real estate for the purposes of the will, and the trust takes effect, and there is an ultimate beneficial interest undisposed of, that undisposed-of interest goes to the heir. If, on the other hand, it is a conversion of personal estate into real estate, and there is an ultimate limitation which fails of taking effect, the interest which fails results for the benefit of the persons entitled to the personal estate; that is, the persons who take under the Statute of Distributions as next of kin (l). Their right to the residue of the personal estate is a statutory right independent of the will."

5. How the person to whom converted property results, holds it.—It is frequently an important question as to what nature property directed to be converted assumes in the hands of persons to whom it results. For instance, if, by a will, real estate be directed to be sold, and is actually sold, and the trusts as to one moiety of the proceeds fail, that moiety will of course result to the testator's heir. But the question then arises, does it become in his hands real or personal estate? That is to say, in the event of his death, does it devolve on his heir or his personal representatives? At one time it was considered that there was a difference, as to this, between a resulting trust of converted realty, and a resulting trust of converted

<sup>(</sup>l) Cogan v. Stephens, 5 L. J., Ch. 17; Bective v. Hodgson, 10 H. L. C. 656.

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personalty. It was thought that as to the former, where a sale of realty was necessary for carrying out the subsisting trusts of a will, that which resulted to the heir was retained by him as personalty, and on his death devolved as such. So far, that is still the law. But it was also considered that, wherever personal estate directed to be converted into land resulted to next of kin. they held it as personalty, although it came to them in the form of land (m). This view was, however. scouted by Jessel, M.R., and finally overruled by the Court of Appeal, in the case of Curteis v. Wormald (n). The M.R. said: "Then the next question which arises is, how does the heir-at-law in the first case, or the next of kin in the second, take the undisposed-of interest. The answer is, he takes it as he finds it. If the heir-at-law becomes entitled to it in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representatives; and consequently his executor takes it as part of his personal estate. On the other hand, if the next of kin, having become entitled to a freehold estate [under a resulting trust of converted personalty], dies, there is no equity to change the freehold estate into anything else on his death. It will go to the devisee of the real estate, or to the heir-at-law if he has not devised it, and will pass as real estate." And Lord Justice James, in

(n) 10 C. D. 172.

<sup>(</sup>m) Reynolds v. Godlee, Johns. 536 (overruled).

the Court of Appeal, said: "With all deference to the judgment of Lord Hatherley in Reynolds v. Godlee (o), it is impossible, I think, to arrive at any other conclusion than that at which the Master of the Rolls has arrived. It was settled by Cogan v. Stephens (p), that what was the right rule as between the real and personal estates where land was directed to be sold, was also the right rule as between the two estates in the case where money was directed to be laid out in the purchase of land. . . . The same principle applies in both cases, which is this, that where you trace property into a man, there is no equity between his different classes of representatives as to altering the position in which that property is. If it is money arising from the sale of land, it remains money; that is to say, the heir-at-law of the person who has become beneficially entitled to it as heir-at-law, has no right to have it reconverted into land. If it is land purchased under a direction to invest in land, the persons interested in the personal estate of the persons who have become entitled to it as next of kin, have no right to have it reconverted into money."

6. Immaterial that property not actually converted if it ought to be .- The broad statement by the late M.R. in Curteis v. Wormald (quoted in the last illustration), that the party to whom property results "takes it as he finds it," is apt to

<sup>(</sup>o) Ubi supra. (p) 5 L. J., Ch. 17.

mislead the unwary. It would be more accurate to say that he takes it as he ought to find it. That is to say, if the trust for conversion wholly fails, he takes it as unconverted; but if it only partially fails, then as the conversion dates from the death of the testator (even though it is directed to be made at a future date (q), he takes it as converted, and it devolves accordingly, notwithstanding that in point of fact the conversion is not, as it ought to be, carried out in accordance with the trust. Thus, a testator died in 1864, having devised his real estate upon trust for sale, and directed that the proceeds should form part of his residuary estate which he settled upon certain trusts for the benefit of persons for life, with remainder in trust for a contingent class which failed. The trusts for the life tenants did not however fail. Sales of the real estate were made from time to time, in accordance with the trust, but, on the death of the last life tenant, some part of the realty still remained unsold. Of course the entire realty and the proceeds of that which had been sold, resulted to the testator's heir; but she had died intestate many years before, and the question arose as to whether the realty which still remained unconverted, devolved upon the heir's heir, or upon her next of kin. It was argued that it must be taken as it was found, and that it devolved as real estate. Mr. Justice Chitty, however, decided against this contention,

<sup>(</sup>q) Clarke v. Franklin, 4 K. & J. 257.

saying: "There is a trust for the heir. But a trust for the heir of what? Clearly, a trust of the personal estate. It appears to me, that the decisions have always gone upon the footing, that the heir, who takes under circumstances such as these, takes the property in the state into which it is converted by the will. Where there is a partial undisposed interest of real estate directed to be sold, that interest results to the heir of the testator, and it becomes personal estate in his hands. . . . There is the other proposition, namely, that, if the purposes of the direction for conversion in the will wholly fail—that is, if all the legatees of the moneys to be produced by the sale die in the testator's lifetime, so that there is a total failure of the objects for which the conversion was to be made—the property will devolve upon the heir as real estate. But I have to deal with the case of a partial failure" (r).

7. It must be pointed out that precisely the same rule applies where property results on failure of trusts created by instrument inter vivos. As has been pointed out above, such property results to the settlor in the first instance; but the character in which he retains it is determined by precisely the same principles as have been indicated in the last illustration. That is to say, if the conversion ought to take place, that which

<sup>(</sup>r) Re Richerson, Scales v. Heyhoe, (1892) 1 Ch. 379; Jessop v. Watson, 1 M. & K. 665; Att.-Gen. v. Lomas, 9 Ex. 29.

results is retained in its converted form, notwithstanding that the actual conversion may not be carried out until after the settlor's death; but where there has been a total failure of the objects for which conversion was directed, it results to the settlor in its unconverted form, and so devolves.

8. Mere power to convert.—The reader must be warned that a mere power to convert, as distinguished from an imperative trust, does not effect any conversion (s). But if it be exercised, the property will then be converted, unless there be a trust declared of the proceeds sufficient to reconvert it (t), which is a question of construction (u).

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<sup>(</sup>s) Fletcher v. Ashburner, 1 W. & T. L. Cas. 741. (t) De Beauvoir v. De B., 3 H. L. C. 524; Greenway v.

Greenway, 29 L. J., Ch. 601.

(u) Where there is a trust to reinvest the proceeds in real or leasehold estate. See Re Bird, Pitman v. P., (1892) 1 Ch. 279.

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# Constructive Trusts which are not Resulting.

ART. 25. Constructive Trusts of Profits made by Persons in Fiduciary Positions.

26. Constructive Trusts where Equitable and Legal Estates are not united in one Person.

ART. 25.—Constructive Trusts of Profits made by Persons in Fiduciary Positions.

Where a person has the management of property, either as an express trustee, or as one of a succession of persons partially interested under a settlement, or as a guardian, or other person clothed with a fiduciary character, he is not permitted to gain any personal profit by availing himself of his position. If he does so, he will be constructive trustee of such profit for the benefit of the persons equitably entitled to the property, in respect of which such profit was gained.

ILLUST.—1. Trustee renewing lease to himself.—In the leading case of Sandford v. Keech (a), a lessee of the profits of a market had devised the lease to a trustee for an infant. On the expiration of the lease, the trustee applied for a renewal, but the lessor would not renew, on the ground that the infant could not enter into the usual covenants. Upon this, the trustee took a lease to himself for his own benefit; but it was decreed by Lord King, that he must hold it in trust for the infant, his lordship saying, "If a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to cestuis que trust."

2. Profit made by trustee.—So where the solicitors in an administration action presented their client, the trustee, with half of their profit costs, North, J., (while holding that in the administration action he had no jurisdiction in the matter) intimated that if a separate action were brought against the trustee he would have no defence to it (b).

3. Tenant for life of leaseholds renewing to himself.—And so also a tenant for life of leaseholds (even though they be held under a mere yearly tenancy (c)), who claims under a settlement, cannot renew them for his own sole benefit. For he is not permitted to avail himself of his position, as the person in possession under the settlement,

(b) Re Thorpe, Vipont v. Radcliffe, (1891) 2 Ch. 360.
 (c) James v. Deane, 15 V. 236.

<sup>(</sup>a) Sel. Ch. Ca. 61; and see Re Morgan, Pillgrem v. Pillgrem, 18 C. D. 93; and Brinton v. Lulham, 53 L. T. 9.

to get a more durable term, and so to defeat the probable intentions of the settlor that the lease should be renewed for the benefit of all persons claiming under the settlement (d). And even where the lessor refuses to renew, the tenant for life or his assigns cannot purchase the lessor's interest for their own benefit, but will be considered as mere trustees of it for the persons who would be entitled to the leasehold interest if it had been renewed (e).

- 4. Tenant for life receiving money in relation to inheritance.—And upon similar grounds, if a tenant for life accepts money in consideration of his allowing something to be done which is prejudicial to the trust property (as, for instance, the unopposed passage of an act of parliament sanetioning a railway), he will be a trustee of such money for all the persons interested under the settlement (f).
- 5. Other partial owners.—The same principle applies to mortgagees (g), joint tenants (h), partners (i), and owners of land subject to a charge (k).

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<sup>(</sup>d) Eyre v. Dolphin, 2 B. & B. 290; Mill v. Hill, 3 H. L. C. 828; Yew v. Edwards, 1 D. & J. 598; James v. Deane, supra. The reader is also referred to Re Payne, Kibble v. Payne, 54 L. T. 840, and infra, art. 46.
(e) Re Lord Ranelagh, 26 C. D. 590.

<sup>(</sup>f) Pole v. Pole, 2 Dr. & S. 420. (g) Rushworth's case, Free. 13.

<sup>(</sup>h) Palmer v. Young, 1 Ver. 276. (i) Featherstonhaugh v. Fenwick, 17 V. 311; Clegg v. Fishwick, 1 M. & G. 294; Bell v. Barnett, 21 W. R. 119; but as to partners, see Dean v. MacDowell, 8 C. D. 345.

<sup>(</sup>k) Jackson v. Welsh, L. & G. t. Plunket, 346; Winslow v. Tighe, 2 B. & B. 195; Webb v. Lugar, 2 Y. & C. 247.

6. How far directors and other agents are constructive trustees of profits.—Directors of a company cannot avail themselves of their position to enter into beneficial contracts with the company (1); nor can they buy property, and then sell it to the company at an advanced price. Promoters of a company hold a fiduciary relation towards the company, and cannot be allowed to retain a secret commission received from the vendors of property which the company is formed for the purpose of purchasing (m). Directors cannot receive commissions from other parties on the sale of any of the property of the company (n); and generally they cannot deal for their own advantage with any part of the property or shares of the company (o).

7. Profits made by agents.—However, notwithstanding some dicta to the contrary, it would seem that where profits are illegally made by agents, although they must give them up to their principals, they are not considered to be constructive trustees of the profits, so as to give the principals the right of following the profits if converted into other kinds of property. The relation appears

<sup>(</sup>l) Great Luxembourg Rail. Co. v. Magnay, 25 B. 586; Aberdeen Rail. Co. v. Blackie, 1 Macq. 461; Flanagan v. G. W. Rail. Co., 19 L. T., N. S. 345.

<sup>(</sup>m) Hitchens v. Congreve, 1 R. & M. 150; Fawcett v. Whitehouse, ibid. 132; Beck v. Kantorowicz, 3 K. & J. 230; Bagnall v. Carlton, 6 C. D. 371; Emma Silver Mining Company v. Grant, 11 C. D. 918.

<sup>(</sup>n) Gaskell v. Chambers, 26 B. 360. (o) York, &c. Co. v. Hudson, 16 B. 485.

to be one of debtor and creditor, and not of trustee and cestui que trust (p).

8. Solicitor buying from client.—A solicitor who purchases property from a client must, if the sale be impeached, not only show that he gave full value for it, but also that the client was actually benefited by the transaction. And persons who subsequently purchase from the solicitor with notice of the transaction are under a similar liability (q).

Art. 26.—Constructive Trusts where Equitable and Legal Estates are not united in the same Person.

In every case (not coming within the scope of any of the preceding articles) where the person in whom real or personal property is vested, has not the whole equitable interest therein, he is pro tanto a trustee for the persons having such equitable interest (r).

<sup>(</sup>p) Lister & Co. v. Stubbs, 45 C. D. 1; and see also Boston Co. v. Ansell, 39 C. D. 339; and Kimber v. Barber, 8 Ch. App. 56. And as to how far a liquidator of a company is a trustee, as distinguished from an agent, see Knowles v. Scott, (1891) 1 Ch. 717.

Knowles v. Scott, (1891) 1 Ch. 717. (q) Topham v. Spencer, 2 Jur., N. S. 865. (r) This article, doubtless, includes all those relating to constructive trusts which have preceded it; but as it would be a quite endless task to enumerate every kind of constructive trust (for they are, as has been truly said, conterminous with equity jurisprudence), I have thought

ILLUST. -1. Relation of vendor and purchaser before completion.—Thus, where a binding contract is entered into between two persons for the sale of property by one to the other, then, in the words of Lord Cairns, in Shaw v. Foster (s), "There cannot be the slightest doubt of the relation subsisting in the eye of a court of equity between the vendor and the purchaser. vendor is a trustee of the property for the purchaser: the purchaser is the real beneficial owner in the eye of a court of equity of the property; subject only to this observation, that the vendor (whom I have called a trustee) is not a mere dormant trustee; he is a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and cestui que trust subsists, but subsists subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property." He is, however, only trustee pro tanto, and his duties are strictly matter of contract (t).

2. Vendor's lien after conveyance.—In the converse case, where the vendor has actually conveyed the property, but the purchaser has not paid the

it better to call special attention to those classes which are most important, and to bring all others within one sweeping general clause.

<sup>(</sup>s) 5 H. L. 338; Earl of Egmont v. Smith, 6 C. D. 469.
(t) See per Lord Westbury in Knox v. Gye, L. R., 5 H. L. 656; but see Earl of Egmont v. Smith, supra.

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purchase-money, or has only paid part of it, the vendor has a lien upon the property for the unpaid portion (u); and the purchaser will hold the estate as a trustee pro tanto, unless by his acts or declarations the vendor has plainly manifested his intention to rely not upon the estate, but upon some other security, or upon the personal credit of the individual (x). A mere collateral security will not, however, suffice (y); but where it appears that a bond, covenant, mortgage or annuity was itself the actual consideration—the thing bargained for-and not merely a collateral security for the purchase-money (z), there will be no lien, and consequently no trust.

3. Equitable mortgages.—It need scarcely be pointed out that a mortgagor, in the case of an equitable mortgage, is pro tanto a trustee for the mortgagee. For even where there is no written memorandum, a deposit of title deeds is of itself evidence of an agreement for the mortgage of the property (a); and in accordance with the maxim, that "equity regards that as done which ought to be done," the mortgagor holds the legal estate,

<sup>(</sup>u) Mackreth v. Symmons, 1 Lead. Ca. 295. (x) Ibid.

<sup>(</sup>y) Collins v. Collins, 31 B. 346; Hughes v. Kearney, 1 Sch. & L. 134.

<sup>(</sup>z) 1 Lead. Ca. 317; Buckland v. Pocknell, 13 Sim. 499; Parrott v. Sweetland, 3 M. & K. 655; Dixon v. Gayfere, 21 B. 118; Dyke v. Rendall, 2 D., M. & G. 209; and see Re Brentwood Brick and Coal Co., 4 C. D. 562.

<sup>(</sup>a) Russell v. Russell, 1 Lead. Ca. 674; Ex parte Wright, 19 V. 258; Pryce v. Bury, 2 Dr. 42; Ferris v. Mullins, 2 Sm. & Gif. 378; Ex parte Moss, 3 D. & S. 599.

in trust to execute a legal mortgage to the mortgagee.

4. Devolution of mortgaged property.—Upon the death of a mortgagee, the mortgaged property (if assured to him in fee) descended at law, previous to the Vendor and Purchaser Act, 1874, to his heir; but being in reality only a security for money, it equitably belonged to his personal representatives, and the heir was, therefore, held to be a mere trustee for the administrators or

executors of the mortgagee (b).

5. Mortgagee in possession.—So a mortgagee in possession is constructively a trustee of the rents and profits, and bound to apply them in a due course of administration (c). But there has been considerable conflict of opinion as to the extent of his responsibility. For instance, it has been held that he is liable even after transferring the mortgage without the mortgagor's consent (d); but this decision has been questioned, and, it is respectfully apprehended, rightly so (e). In another case, it was said that a mortgagee in possession who, after the mortgagor's death, bought up the widow's right to dower, was obliged to hold it in

<sup>(</sup>b) Thornborough v. Baker, 2 Lead. Ca. 1030. But see 37 & 38 Vict. c. 78, ss. 4, 5.

<sup>(</sup>c) Lew. 169; Coppring v. Cooke, 1 Ver. 270; Bentham v. Haincourt, Pr. Ch. 30; Parker v. Calcraft, 6 Mad. 11; Hughes v. Williams, 12 V. 493; Maddocks v. Wren, 2 Ch. Rep. 109.

<sup>(</sup>d) Venables v. Foyle, 1 Ch. Ca. 3.

<sup>(</sup>e) Lew. 169; and consider Ringham v. Lee, 15 Sim. 400.

trust for the heir, upon his paying the purchasemoney (f); and although this case has called forth much comment (g), it is difficult to distinguish it in principle from the class of cases treated of in the last article.

6. Limited owners paying off charge on inheritance or calls on shares .- Another important illustration of the rule now under consideration occurs when a limited owner (ex. gr. a tenant for life) pays off a specific (h) incumbrance out of his own money. In such a case (in the absence of evidence showing an intention to extinguish the incumbrance) he is held to be, in equity, in the position of a transferee of the incumbrance, notwithstanding that he took an ordinary reconveyance; and, on his death, the remainderman holds the legal estate subject to the equitable lien or charge so created (i). On the same ground, it has been held that a tenant for life under a settlement comprising shares in a company, has a lien on the shares for repayment, with interest, of advances made at the request of the trustees, for the purpose

<sup>(</sup>f) Baldwin v. Bannister, cited in Robinson v. Pett, 3 P. W. 251.

<sup>(</sup>g) Dobson v. Land, 8 Ha. 330; Arnold v. Garner, 2 Ph. 231; Mathison v. Clarke, 3 Dr. 3.

<sup>(</sup>h) See Morley v. Morley, 25 L. J., Ch. 7.

<sup>(</sup>i) Redington v. Redington, 1 Ba. & B. 131; St. Paul v. Dudley, 15 V. 172; Drinkwater v. Coombe, 2 S. & St. 340. As to case where tenant for life of a lease for lives purchases the reversion and settles it, see Isaac v. Wall, 6 C. D. 706; and, as to evidence showing contrary intention, see Astley v. Miller, 1 Sim. 298; Tyrwhitt v. Tyrwhitt, 32 B. 244.

of paying calls (k). It would seem, however, that where income has been expended in improving property, the court (apart from the Improvement of Land and the Settled Land Acts) has no jurisdiction to declare the expenditure a charge on the property (l).

- 7. Partnership liens. So, again, where the plaintiff was induced by fraud of the defendant to purchase a share of his business, and to enter into partnership with him, and judgment was given for the rescission of the agreement and the dissolution of the partnership, it was held that the plaintiff was entitled, in respect of the purchase-money which he had paid, to a lien on the surplus of the partnership assets after satisfying the partnership debts and liabilities; and that, in respect of any sums which he had paid or might pay in satisfaction of partnership debts, he was entitled to stand in the place of the partnership creditors to whom he had made the payments (m).
- 8. Property acquired by fraud.—Upon similar principles, a court of equity converts a party who has obtained property by fraud "into a trustee for the party who is injured by that fraud (n). But, that being a jurisdiction founded on personal fraud, it is incumbent on the court to see that a fraud, or

(n) See Booth v. Turle, 16 Eq. 182.

<sup>(</sup>k) Todd v. Moorhouse, 19 Eq. 69.
(l) See Floyer v. Bankes, 8 Eq. 115.
(m) Mycock v. Beatson, 13 C. D. 384; and as to sale of land obtained by fraud, see Rose v. Watson, 10 H. L. C. 672; and see also Aberaman Ironworks v. Wickens, 4 Ch.

malus animus, is proved by the clearest and most indisputable evidence; it is impossible to supply presumption in the place of proof "(o).

<sup>(</sup>o) Per Lord Westbury in McCormick v. Grogan, L. R., 4 H. L. 88. As to a person who has by fraud prevented a will being made in plaintiff's favour, see Dixon v. Olmius, 1 Cox, 414; and see also as to gifts made under undue influence to fiduciary persons, pp. 117—119, supra.

# Division IV.

# THE ADMINISTRATION OF A TRUST.

#### CHAPTER I.—PRELIMINARY.

ART. 27. Disclaimer of a Trust.

,, 28. Acceptance of a Trust.

# CHAPTER II.—THE ESTATE OF THE TRUSTEE, AND ITS INCIDENTS.

ART. 29. Where the Trustee takes any Estate.

- ,, 30. The Quantity of Estate taken by the Trustee of Lands.
- ,, 31. Bankruptcy of the Trustec.
- ,, 32. The Incidents of the Trustee's Estate at Law.
- ,, 33. Failure of Beneficiaries.

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### CHAPTER I.

### PRELIMINARY.

ART. 27. Disclaimer of a Trust., 28. Acceptance of a Trust.

ART. 27.—Disclaimer of a Trust.

No one is bound to accept the office of trustee (a). Both the office and the estate may be disclaimed before ac-

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<sup>(</sup>a) Robinson v. Pett, 2 Lead. Ca. 238.

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ceptance, either by deed (b) or (save in the case of a married woman, who must disclaim by deed(c) by conduct tantamount to a disclaimer (d). The disclaimer should be made within a reasonable period, having regard to the circumstances of the particular case (e).

ILLUST.-1. Consent to undertake future trust not binding.—Thus, even though a person may have agreed in the lifetime of a testator to be his executor, he is still at liberty to recede from his promise at any time before proving the will (f).

2. Methods of disclaiming.—A prudent man will, of course, always disclaim by deed, in order that there may be no question of the fact; but a disclaimer by counsel at the bar, or even by conduct inconsistent with acceptance, is sufficient (g). For instance, in Stacey v. Elph (h), a person, named as executor and trustee under a will, did not formally renounce probate until after the death of the act-

<sup>(</sup>b) Stacey v. Elph, 1 M. & K. 199.

<sup>(</sup>c) 8 & 9 Vict. c. 106, s. 7. Sed quære, since Married

Women's Property Act, 1882.
(d) Stacey v. Elph, supra; Townson v. Tickell, 3 B. & A. 31; Begbie v. Crook, 2 B. N. C. 70; Bingham v. Clanmorris, 2 Moll. 253; and Re Birchall, Birchall v. Ashton, 40 C. D. 436.

<sup>(</sup>e) See Doe v. Harris, 16 M. & W. 522; Paddon v. Richardson, 7 D., M. & G. 563; James v. Frearson, 1 Y. & C. C. C. 370.

<sup>(</sup>f) Doyle v. Blake, 2 Sch. & L. 239. (g) Foster v. Dawber, 8 W. R. 646.(h) Supra.

ing executor, nor formally disclaim the trusts of the will; but he purchased a part of the real estate, and took a conveyance from the tenant for life and the heir-at-law to whom the estate must have descended on disclaimer of the trust. It was held, under these circumstances, that he had by his conduct disclaimed the office and estate of trustee under the will. Sir J. Leach, M. R., in delivering judgment, said: "In this case there is no ambiguity in the conduct of the defendant; he never interfered with the property, except as the friend or agent of the widow; and it is plain from the confidence which the testator appears to have placed in him by his will that he was a particular friend of the family. . . . It is true he never executed a deed disclaiming the trust, but his conduct disclaimed the trust; in the purchase of the small real estate made by him, he took by feoffment from the widow and eldest son of the testator, in whom the estates could only vest by the disclaimer of the trustee."

3. Deed of disclaimer not necessary.—In Re Ellison's Trusts (i), Sir W. Page Wood, V.-C., expressed some doubt whether a freehold estate could be disclaimed by parol, or otherwise than by deed. His honour's attention does not appear, however, to have been called to Stacey v. Elph, and in the more recent case of Re Gordon, Gordon v. Roberts (k), where real estate was devised to

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<sup>(</sup>i) 2 Jur., N. S. 262. (k) 6 Ch. D. 531.

trustees upon trust to sell and to form a mixed fund consisting of the proceeds of such sale and of the testator's personal estate, and thereout to pay debts and legacies, with divers trusts over, and the trustees were also nominated executors, and renounced probate, and never acted in the trusts, it was held by Sir George Jessel, M. R., that the renunciation of probate, coupled with the fact that the trustees had never assumed to act as such, was conclusive evidence of disclaimer, Lastly, in Re Birchall, Birchall v. Ashton (1), the Court of Appeal held that a trustee had by conduct disclaimed the office, and that having disclaimed the office, he must of necessity have also disclaimed the estate. As Cotton, L. J., said, "I should be sorry that it should be thought that a trustee could disclaim the office of trustee, and nevertheless take the legal estate."

4. Time for disclaimer.—No doubt a person named as trustee who means to disclaim, ought, in prudence, to execute a disclaimer, or otherwise intimate his refusal at once. There is, however, no rule as to this, and a person has been allowed to disclaim after sixteen years. On the other hand, long acquiescence may be evidence of acceptance, although, of course, not conclusive evidence (m).

<sup>(</sup>l) 40 C. D. 436. (m) Lewin, 9th ed. c. 11, s. 3.

ART. 28.—Acceptance of a Trust.

A person may accept the office of trustee expressly; or he may do so constructively by doing such acts as are only referable to the character of trustee or executor (n); or he may do so by long acquiescence.

ILLUST.—1. Express acceptance.—A trustee expressly accepts the office by executing the settlement (o), or by making an express declaration of his assent (p).

- 2. Acceptance by acquiescence.—Permitting an action concerning the trust property to be brought in his name (q), or otherwise allowing the trust property to be dealt with in his name (r), is such an acquiescence as will be construed to be an acceptance of the office.
- 3. Acceptance by exercise of dominion.—So, exercising any act of ownership, such as advertising the property for sale, giving notice to the tenants to pay the rents to himself or an agent, or requesting the steward of a manor to enrol a deed in relation to the trust property, is sufficient to constitute acceptance of a trust (s).

(n) Spence, 918.

<sup>(</sup>o) Buckeridge v. Glasse, 1 Cr. & Ph. 134. (p) Doe v. Harris, 16 M. & W. 517.

<sup>(</sup>q) Montford v. Cadogan, 17 V. 485. (r) James v. Frearson, 1 Y. & C. C. C. 370.

<sup>(</sup>s) Bence v. Gilpin, L. R., 3 Ex. 76.

- 4. Acceptance by taking out probate.—So, where the office of executor is clothed with certain trusts, or where the executor is also nominated the trustee of real estate under a will, he is construed to have accepted the office of trustee if he takes out probate to the will (t). And acceptance of the trusts of a will was, prior to 1883, constructive acceptance of the office of trustee of estates, devised thereby, of which the testator was trustee (u).
- 5. Acceptance by conduct.—In Conungham v. Conyngham (x), one, Coleman, was appointed trustee of a will, but he never expressly accepted the appointment. One of the trusts was in respect of the rents of a plantation then in lease to the testator's son. Coleman acted as the agent of the son, who was also heir-at-law, and received the rents of the estate from him. It was held that, by so interfering with the trust property, he could not repudiate the trust, and say that he merely acted as the son's agent. He received the property from the person who was nominally to have remitted the rents, and it was incumbent on him, if he would not have acted as trustee, to have refused, and not to leave himself at liberty to say he acted as trustee or not. It is, however, not every interference with trust property which will be construed as an acceptance of the office of

<sup>(</sup>t) Mucklow v. Fuller, Jac. 198; Ward v. Butler, 2 Moll. 533.

<sup>(</sup>u) Re Perry, 2 Curt. 655; Brooke v. Haynes, 6 Eq. 25. (x) 1 V. sen. 522.

trustee; for if such interference be plainly (not ambiguously) referable to some other ground, it will not operate as an acceptance (y); nor will merely taking charge of a trust until a new trustee can be found, be, of itself, a constructive acceptance (z).

- 6. Moreover in a recent case, the joining in the legacy duty receipt for the trust fund, unaccompanied by the active receipt of the money, was held to be of itself insufficient to fix the trustee with acceptance of the trust (a).
- 7. Acceptance by long silence.—Where a trustee, with notice of the trust, has indulged in a passive acquiescence for some years, he will be presumed to have accepted it, in the absence of any satisfactory explanation (b).

<sup>(</sup>y) Stacey v. Elph, 1 M. & K. 195; Dove v. Everard, 1 R. & M. 231; Lowry v. Fulton, 9 Sim. 115.

<sup>(</sup>z) Evans v. John, 4 B. 35. But it would be highly dangerous, even if this case were now followed, which seems doubtful.

<sup>(</sup>a) Jago v. Jago, 68 L. T. 654.

<sup>(</sup>b) Wise v. Wise, 2 J. & Lat. 403; Re Uniacke, 1 J. & Lat. 1; Re Needham, ibid. 34.

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#### CHAPTER II.

# THE ESTATE OF THE TRUSTEE, AND ITS INCIDENTS.

ART. 29. Cases in which the Trustee takes any Estate.

- ,, 30. The Quantity of the Estate taken by the Trustee of Lands.
- ,, 31. Bankruptcy of the Trustee.
- ,, 32. The Incidents of the Trustee's Estate at Law.
- ,, 33. Trustee's Estate on Total Failure of Beneficiaries.

# Art. 29.—Cases in which the Trustee takes any Estate.

- (1) Where the trust is a simple trust, and the trust property is of freehold tenure, then, in consequence of (or in the case of wills by analogy to) the Statute of Uses, the trustee takes no estate unless the property be limited to his use, or unless there be a clear intention to vest an estate in him. But where the trust is a special trust, the statute does not apply, and the trustee will take a legal estate of some duration.
  - (2) Where the trust property is of copyhold or leasehold tenure, or is pure

personalty, the Statute of Uses is inapplicable, and the trustee takes the legal estate, whether the trust be simple or special.

(3) This article has no application where the legal estate is outstanding.

ILLUST.—1. Trust to permit beneficiary to receive rents.—Thus, where the legal estate in freehold is limited to trustees, and the words used are "in trust to pay to" a specified person the rents and profits, there the trustees take the legal estate, because they must receive before they can make the required payments. But where the words are "in trust to permit and suffer A. B. to take the rents and profits," there the use is divested out of them and executed in the party beneficially entitled, the purposes not requiring that the legal estate should remain in the trustees (a).

2. Trust to permit beneficiary to receive net rents.—Where, however, the trustees are to permit and suffer the beneficiary to receive the *net* or clear rents and profits, the trustees take the legal estate; it being presumed that the trustees are to take the gross rents, and after payment of outgoings, to hand over the *net* rents to the beneficiary (b).

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<sup>(</sup>a) Per Parke, J., Barker v. Greenwood, 4 M. & W. 429; Doe d. Leicester v. Biggs, 2 Taunt. 109; Doe v. Bolton, 11 A. & E. 188.

<sup>(</sup>b) Barker v. Greenwood, supra; White v. Parker, 1 Bing. N. C. 573; Shapland v. Smith, 1 Bro. C. C. 75.

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3. Trust to pay or permit beneficiary to receive. Where the language is ambiguous, and may be read either as implying a simple or a special trust. it has been said that the question must be determined according to the general rules of construction. Thus, in Doe v. Biggs (c), it was decided that the words "to pay or permit him to receive" would, if contained in a deed, create a special trust, inasmuch as of two inconsistent expressions in a deed the first prevails; whereas the same words occurring in a will would create a simple trust, as a testator's last words are preferred. However, this case cannot be relied on. As Lindley, L. J., said in a recent case (d), "Doe v. Biggs is one of those cases which may be classed as anomalies, and it is so known to and understood by conveyancers and real property lawyers, who take care to draw instruments accordingly. I do not think it is a sensible decision. I do not think that case could be possibly so decided now if the question arose for the first time; and I am not disposed to extend it. On the other hand, I do not wish to shake titles; and I shall do precisely what our predecessors have always done—leave the case where it is." L. J., went even further, saying, "I agree with the late Master of the Rolls that the case is not one the precedent of which is really applicable to other cases. In most cases, there is sure to be a context which displaces the conclusion at which the court

<sup>(</sup>c) 2 Taunt. 109; Baker v. White, 20 Eq. 166, 171. (d) Re Lashmar, Moody v. Penfold, (1891) 1 Ch. 258; and see Re Tanqueray, Willaume and Landau, 20 C. D.

arrived in that instance." The reader is therefore warned that Doe v. Biggs cannot be safely relied upon as a precedent.

- 4. Control or discretion in trustees.—So, again, where the trustees are to exercise any control or discretion they take some estate. For instance, where the beneficiary is empowered to give receipts for the rents with the approbation of the trustees (e), or the trust is for the separate use of a married woman, who consequently requires protection, the trustees take the legal estate (f); at all events, where the trust is created by will. But where it is created by deed, it would seem that the common law courts, not recognizing the separate estate of a feme covert, would (at all events before the Judicature Act, 1873) have held that such a trust was a simple trust, and therefore came within the Statute of Uses (g).
- 5. Charge of debts.—Where property is devised to trustees charged with payment of debts, and subject thereto in trust for A., there, as the trustees are not directed to pay the debts, they have no duties, and consequently take no estate (h).

(f) Harton v. Harton, 7 T. R. 652. But query, whether this would be so since the Married Women's Property Act, 1882.

(h) Kenrick v. Lord Beauclerk, 3 B. & P. 175.

<sup>(</sup>e) Gregory v. Henderson, 4 Taunt. 772; and see also Davies to Jones and Evans, 24 C. D. 190, where a legal estate was implied without any devise to the trustees. But conf. Re Cameron, 26 C. D. 19.

<sup>(</sup>g) Williams v. Waters, 14 M. & W. 166; see Nash v. Allen, 1 H. & C. 167.

But it would be otherwise if they had to pay them (i).

- 6. Freeholds or copyholds in one trust.—In Houston v. Hughes (k), it was held that (notwithstanding the Statute of Uses), under a devise of freeholds and copyholds to A. and his heirs, in trust for B. and his heirs, the circumstance that A. took an estate in the copyholds was an argument in favour of an intention that he should take the legal estate in the freeholds. However, this doctrine was dissented from by Jessel, M.R., in Baker v. White (l), and it is clear that even if it could be supported in the case of a will, a similar limitation in a deed would be construed far more strictly.
- 7. Devise to the use of trustees.—So, where lands are devised unto or to the use of trustees in trust for B., the trustees take the legal estate irrespective of any active trust (m).
- 8. Trust to convey to beneficiaries.—Again, even where the active trust is of a trivial description, yet, if it implies an intention to vest the legal estate in the trustee, it is apprehended that, notwithstanding the Statute of Uses, effect will be given to that intention. Thus, if a trustee devises Greenacre to A. and B. and their heirs, upon trust forthwith to convey and assure the same to C. in

<sup>(</sup>i) Smith v. Smith, 11 C. B., N. S. 121; Marshall v. Gingell, 21 C. D. 790; and see as to what amounts to a direction to the trustees to pay debts, Spence v. Spence, 10 W. R. 605; Creaton v. Creaton, 3 Sm. & G. 386; and Re Brooke, Brooke v. Brooke, (1894) 1 Ch. 43.

<sup>(</sup>k) 6 B. & C. 403. (l) 20 Eq. 166.

<sup>(</sup>m) Doe v. Field, 2 B. & Ad. 564.

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fee, A. and B. will take the legal estate, for they have an active duty to perform, viz., to convey it to C.(n).

9. Power of sale given to trustee.—A devise to trustees upon trust for A. for life, with remainder to B. in fee, followed by a *power* to sell, lease, or mortgage, vests the legal estate in the trustees, for the exercise of the power might become an active duty (o).

Art. 30. The Quantity of Estate taken by the Trustee of Lands.

Whenever, under the preceding article, a trustee takes a legal estate in land, the quantity of that estate is determined by the following principles:—

 $\alpha$ . If the settlement is a deed, it will be construed strictly, and the estate of the trustee will not be enlarged or diminished by any reference to the exact estate required to carry out the trust (p). But where there is a limi-

(o) Watson v. Pearson, 2 Exch. 581; Doe d. Cadogan v. Ewart, 7 A. & E. 636.

<sup>(</sup>n) Doe d. Shelley v. Edlin, 4 A. & E. 582; Doe d. Noble v. Belton, 11 A. & E. 188.

<sup>(</sup>p) Cooper v. Kynock, 7 Ch. App. 398; Blaker v. Anscombe, 1 B. & P. N. R. 25; Venables v. Morris, 7 T. R. 342; Wykham v. Wykham, 18 V. 395, per Eldon; Colmore

tation in fee to a trustee for purposes which are confined to the life of a beneficiary, followed by a limitation to the same trustee for a term of years, the fee will be cut down to an estate pur autre vie, by reason of the inconsistency (q).

B. If the settlement is a will dated before the Wills Act, the legal estate given to a trustee will be enlarged or diminished to such an estate as will enable him to perform the trusts; and if no words of limitation are used, the estate will be limited to a definite or indefinite term of years, unless the trust requires the trustee to take the fee (r).

γ. If the settlement is a will executed since the Wills Act, an indefinite devise to a trustee primâ facie passes the fee simple, or other the whole

(q) Curtis v. Price, 12 V. 89; Beaumont v. Marq. of Salisbury, 19 B. 198.

v. Tyndall, 2 Y. & J. 605. If a sufficient estate be not given to the trustee, it is conceived that it would be ground for rectification (see Re Bird, 3 C. D. 214).

<sup>(</sup>r) Cordall's case, Cro. Eliz. 316; Doe v. Simpson, 5 East, 162; Ackland v. Lutley, 9 A. & E. 879; Heardson v. Williamson, 1 Ke. 33; Doe v. Nichols, 1 B. & C. 336; Watson v. Pearson, 2 Ex. 581; Bush v. Allen, 5 Mod. 63; Doe v. Homfray, 6 A. & E. 206.

estate of the testator; and if the trusts by their nature extend over an indefinite period, that presumption is irrebuttable. But if, on the face of the will, it is apparent that an estate pur autre vie would certainly enable the trustee to fulfil all the trusts, he will take that estate only, notwithstanding a limitation to him and his heirs, unless there is a clear intention expressed that he shall take the fee or some other defined estate (s).

<sup>(</sup>s) Paragraph \( \gamma \) of this article is intended and believed to give the effect of the 30th and 31st sections of the Wills Act, 1 Vict. c. 26. By the first of these sections it is enacted, that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will, in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold, shall be given to him expressly or by implication. The 31st section enacts. that where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or shall be given for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will, and not an estate determinable when the purposes of the trust shall be satisfied. Both these sections have been subjected to much criticism, and, strange and almost incredible as it may appear, it is believed that the real history of the two sections is, that they were drafted as

ILLUST.-1. Gift by deed to trustees and their heirs.—In Colemore v. Tyndall (t), under a deed, lands were limited to the use of A. for life, and after his death to the use of B. and his heirs during the life of A., to support contingent remainders, remainder to the use of C. for life, remainder to the same B. and his heirs during the life of C. to support contingent remainders, remainder to the first and other sons of C. in tail male, remainder to divers other uses, remainder to the said B. and his heirs (without saying during the life of the tenant for life) to support and preserve contingent remainders, with divers remainders over. The question arose whether, under the last limitation to B. and his heirs, he took the fee simple, or whether he only took that which was necessary for the purpose of the trust, namely, an estate pur autre vie. But the court held that it was not a sufficient ground for restricting an estate limited by deed to a trustee and his heirs, to an estate for life, because the estate given to the trustee seemed to be larger than was essential to its purpose. And the Lord Chief Baron, quoting from the judgment of Lord Chief Justice Willes in Parkhurst v. Smith, said: "Though the

(t) 2 Y. & J. 605; and see also Cooper v. Kynock, 7 Ch. App. 398; and Re White and Hindle, 7 C. D. 201.

alternative sections, but, by some carelessness, were both allowed to remain in the act when passed (see per Jessel, M.R., Freme v. Clement, 18 C. D. 514). Their meaning is by no means clear; but it is apprehended that their effect is as above stated (see Lew. 217; Shelford's R. P. Stats. 432; 2 Jar. Wills, 321; Hawkins's Wills, 30).

intent of the parties be never so clear, it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them. But where the intent is plain and manifest and the words doubtful and obscure, it is the duty of the judges to endeavour to find out such a meaning in the words as will best answer the intent of the parties." And the Lord Chief Baron also said: "As to the notion that whenever an estate is limited to a person professedly as a trustee, he shall, whatever terms may be used, take only the estate requisite to enable him to perform his trust, and this though of a freehold, and in a deed, I do not find it supported by any authority, nor even by any dictum."

2. Inconsistent limitations.—But even in a deed, where there are limitations which, on a strict construction, would be inconsistent and repugnant, the court will, by supplying obviously omitted words, endeavour to earry out the intention. Thus in Curtis v. Price (u), the facts were as follows: A deed of settlement purported to convey freeholds to P. and J. and their heirs, to the use of M. for life; remainder to the use of E. (the wife) during widowhood; but if she should marry again, to the use of P. and J. and their heirs, in trust out of the rents to pay E. an annuity, and to apply the residue to the maintenance of the

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<sup>(</sup>u) 12 V. 89; and see Beaumont v. Marq. of Salisbury, 19 B. 198.

children of M. and E.; with remainder, after the decease of the survivor of M. and E., to the use of P. and J. for 1,000 years, upon divers trusts. It was held that, as the limitation of the 1,000 years' term to P. and J. was absolutely inconsistent with an intention to give them the fee, the limitation to them and their heirs must be cut down to an estate during the life of E.

3. Gift by will to trustees and their heirs.—And if the limitations stated in the first illustration had been declared by a will, whether executed before or since the Wills Act, instead of in a deed, the decision would clearly have been different. Thus, if lands are devised to trustees and their heirs, upon trust to pay the *net* rents to A. for life, and after A.'s death in trust for B., the trustees, notwithstanding the words of inheritance, only take an estate pur autre vie (viz., during A.'s life); for the active trust reposed in them ends with the life of A., and consequently the purposes of their trust do not require them to take a larger estate (x).

4. Larger estate not implied to rectify testator's mistake.—Nor will the court imply a larger estate (where it is not necessary to carry out the definite trusts of the will), on the ground that by doing so effect would incidentally be given to the testator's intentions. Thus, if freeholds be given to A. for life, with remainder to trustees and their heirs in

<sup>(</sup>x) Blagrave v. Blagrave, 4 Ex. 550; Watson v. Pearson, 2 Ex. 581; Doe v. Cafe, 7 Ex. 675.

trust to preserve contingent remainders, with remainder to the heirs of A., it is obvious that if the trustees could be held to take the fee in reversion expectant on A.'s life estate, the rule in Shelley's case would be rendered inapplicable, and the obvious intention of the testator to give A. a mere life interest would be preserved. But notwithstanding this, the court holds that the trustees only take a contingent estate pur autre vie, that being sufficient to enable them to preserve contingent remainders, which alone was the object of the trust reposed in them (y).

- 5. Estate in trustee to preserve contingent remainder not implied .- On similar grounds, the court will not imply a larger estate in the trustees than the trust requires, merely because, if they took such larger estate, it would support a contingent remainder, and so prevent it from failing for want of a particular estate of freehold (z).
- 6. Direction to pay rents to married women.-On the other hand, where, by will, the rents of certain lands (which are not expressly devised to anyone) are directed to be paid to a married woman's separate use, by the testator's executors, there is an implied devise to the executors of such an estate in the land as will enable them to execute the trust (a), viz., an estate pur autre vie.

(a) Bush v. Allen, 5 Mod. 63.

<sup>(</sup>y) Nash v. Coates, 3 B. & Ad. 839; Haddesley v. Adams, 22 B. 266.

<sup>(</sup>z) Cunliffe v. Brancker, 3 C. D. 393, and cases there cited; Festing v. Allen, 12 M. & W. 279; Marshall v. Gingell, 21 C. D. 790.

7. Trusts requiring a fee simple imply that estate. -So if land be devised to trustees without any words of limitation by a will executed since the Wills Act, and they are expressly directed to sell (b), or impliedly authorized to do so (c) (as by a direction to pay debts (d), whether certainly or contingently, or are authorized to lease or to mortgage (e), or to allow maintenance to infants during a period of suspended vesting (f), or to do any other act which requires the complete control over the property (g), the trustees will take an estate in fee simple, or other the whole estate which the testator could dispose of. With regard, however, to wills executed before the Wills Act, this would not have been so except under a direction to sell (h); for a trust to mortgage or lease, or a trust to maintain infants, could equally have been carried out by a trustee who had merely an indefinite term of years (i).

<sup>(</sup>b) Shaw v. Weigh, 2 Str. 798; Bagshaw v. Spencer, 1 V. 144; Watson v. Pearson, 2 Ex. 581; Cropton v. Davies, L. R. 4 C. P. 159.

<sup>(</sup>c) Gibson v. Lord Montfort, 1 V. 485.

<sup>(</sup>d) Marshall v. Gingell, supra; but see Carlyon v. Truscott, 20 Eq. 348.

<sup>(</sup>e) Doe d. Cadogan v. Ewart, 7 A. & E. 636; Watson v. Pearson, supra; Doe v. Willan, 2 B. & Al. 84; Re Eddel, 11 Eq. 559.

<sup>(</sup>f) Berry v. Berry, 7 C. D. 657; Re Tanqueray, Willaume and Landau, 20 C. D. 465.

<sup>(</sup>g) Villiers v. Villiers, 2 Atk. 72.
(h) Doe d. Cadogan v. Ewart, 7 A. & E. 636.

<sup>(</sup>i) See Cordall's case, Cro. Eliz. 316; Doe v. Simpson, 5 East, 162; Ackland v. Lutley, 9 A. & E. 879; Heardson v. Williamson, 1 Ke. 33.

- 8. Clear intention to vest fee, although not required for trust.—And so, too, the trustees will take the fee simple where there is a clear intention to give it them, notwithstanding that a less estate would certainly enable them to perform the trust. Thus, if lands be devised unto and to the use of A. and his heirs, in trust for B. and his heirs, A. takes the legal estate (k), because there can be no other meaning given to the words used. But a devise unto and to the use of A. and his heirs, in trust for A. for life, and after A.'s death a direct devise to C., gives the trustees merely an estate during the life of A. (l); for the remainder is not limited by way of trust.
- 9. Trust to convey to another.—As another instance of the effect which will be given to a clear expression of intention, may be mentioned the case where a testator devises property to trustees and their heirs, upon trust to pay the net rents to A. for life, and after his death upon trust to convey the property to B. in fee simple. The direction to convey constitutes a special and active trust, which necessarily implies that the trustees should have the legal fee in them; for non dat qui non habet (m).
- 10. Recurring trusts.—And where there are recurring trusts which require the legal estate to be in the trustees, with intervening limitations which,

<sup>(</sup>k) Doe v. Field, 2 B. & A. 564.

<sup>(</sup>l) Doe d. Woodcock v. Barthropp, 5 Taunt. 382.

<sup>(</sup>m) Doe d. Shelley v. Edlin, 4 A. & E. 582; Doe d. Noble v. Bolton, 11 A. & E. 188.

to here to cora le recer e se a se their dute the legal cate prose a Tradice e la 1 dec. or to be vesto de en en e glas, sobrishe and ma iron en se como es se a a cora, but for the secur ing dut en be

taken alone, would vest the legal estate in the persons beneficially entitled, and there is no repetition before each of the recurring trusts of the gift of the legal estate to the trustees, the legal estate is held to be in the trustees throughout, and the intermediate estates are equitable and not legal (n). To show the importance of this principle, it is well to refer to the leading case of Harton v. Harton (n). There the limitations were to trustees, in trust for A. for life for her separate use, remainder to the heirs of her body, remainder to B. for life for her separate use, with remainder to the heirs of her body. Here the separate use gave the trustees an estate during A.'s life, and also during B.'s life; but had it not been for this last trust, they would not have taken the legal estate during the intermediate trust in favour of the heirs of A.'s body. As, however, there was a recurring trust, they did so; and, therefore, as the estate of A., and the estate given to the heirs of her body, were both equitable estates, the rule in Shelley's case applied, and A. took an estate tail.

11. Trust of indefinite duration.—In Collier v. Walters (o) a testator, by will dated before the Wills Act, devised his estate to trustees and their heirs, upon trust that they and their heirs should stand seised of the same during the life of W. C.,

<sup>(</sup>n) Harton v. Harton, 7 T. R. 652; Hawkins v. Luscombe, 2 Sw. 391; Brown v. Whiteway, 8 Ha. 145; Toller v. Atwood, 15 Q. B. 929. (o) 17 Eq. 262.

and also until the whole of the testator's debts and the legacies thereinafter mentioned were paid, upon trust to let the same, and apply the rents in discharge of his debts, after payment of which, they were to apply the rents in payment of legacies, and finally hold the property upon trust to pay the rents to W. C. and his assigns during his life; and after the decease of W. C. and payment of the debts and legacies and all expenses, the testator devised the property to the heirs of the body of W. C., with remainders over. In 1830, the debts and legacies being paid, the trustees conveyed the estate to W. C. for life, who shortly afterwards, relying on the rule in Shelley's case, suffered a common recovery and barred the entail. Upon his right to do this coming in question, Sir George Jessel, M. R., said: "The first observation to make upon this will is this—that there is a gift to trustees and their heirs, and that the trustees and their heirs are to stand seised (they get legal seisin of something, and it was not denied that they must get an estate of freehold of some kind or other) 'for and during the term of the natural life of my brother William, and also until the whole of my just debts and all interest due thereon have been paid.' Now the rule is this—that trustees under a devise to them and their heirs primâ facie take a fee. . . . Now this kind of case was considered in Poad v. Watson (p), and there

<sup>(</sup>p) 6 E. & B. 606.

Mr. Justice Coleridge puts the rule in this way: 'The paramount rule is to look to the intention as appearing on the whole will. But there are secondary rules, one of which is, that the words of devise to trustees and their heirs are to have their natural effect to give a fee simple, unless something shows that it is cut down to an estate terminating at some time ascertained at the time of the testator's death. If no precise period for the termination can be shown, it remains an estate in fee.' Then Mr. Justice Erle says: 'These are words clearly meaning that the testator gave the trustees a fee simple; but if a less estate would certainly enable the trustees to fulfil all the trust, the fee simple would be cut down to that estate.' . . . That rule is therefore a rule which I think is clearly and fairly settled by authority, and should govern me in construing this will. Now there is another rule which may be collected from all the authorities, that you cannot cut down the estate in fee simple unless you can point out on the face of the will what less estate the trustees take. Upon that there is immense difficulty here." Commenting upon the various suggestions by counsel, his lordship continued: "The first, that they took an estate for life with a chattel interest superadded, clearly will not do. . . . If you are to imply a chattel interest from a gift to the trustees upon trust to pay debts and legacies, the chattel interest will be implied from the moment of the testator's death; and it is impossible, therefore, to hold that they took

during the life of W. C., and then took a superadded estate by implication upon trust to pay debts and legacies. Then, as regards the concurrent chattel interest and life estate, did anyone ever hear of such a thing as taking a chattel interest and a freehold estate together? . . . These two being rejected, Mr. Badnall to-day suggested a third, that they took a freehold interest for the life of the tenant for life, and, if necessary, a further chattel interest until the debts were paid." His lordship here gave reasons why, on the special wording of the will, this proposition was untenable, and continued: "These suggestions being out of the way, I think I am at liberty to say that human ingenuity cannot suggest a fifth. Therefore we are reduced to this. The first rule being that those who say they do not take a fee shall point out what estate they take, they cannot suggest any estate which in my opinion can be fairly and properly implied from the words used in this will." His lordship therefore held, that the trustees took the legal fee, and that consequently, W. C., under the rule in Shelley's case, took an equitable estate tail.

Obs.—The rule restricting the estate taken by trustees to the quantity necessary for the performance of the trust, gave rise to the doctrine of indefinite terms, and determinable fees. where property was devised to trustees upon trust out of the rents and profits to pay debts, &c., it was held that they took an indefinite term neces-

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sary to enable them to pay the debts (q). And where the devise was to trustees and their heirs. in trust to raise and pay money, it was held that they took the fee only until the money was raised (r). The 30th and 31st sections of the Wills Act put an end to both these doctrines with regard to wills executed since that act; but, apart from its provisions, it is considered improbable that either doctrine would now be adopted (s), and, indeed, the doctrine of determinable fees has been expressly overruled (t).

### ART. 31.—Bankruptcy of the Trustee.

(1) The property of a bankrupt divisible among his creditors does not comprise property held by him as trustee for any other person (u), although it is property in his order and disposition at the commencement of the bank- $\operatorname{ruptcy}(x)$ .

<sup>(</sup>q) Doe v. Simpson, 5 East, 162; Ackland v. Lutley, 9 A. & E. 879; Heardson v. Williamson, 1 Ke. 33.

<sup>(</sup>r) Glover v. Monckton, 3 Bing. 13.(s) Hawkins on Wills, 149.

<sup>(</sup>t) Doe d. Davies v. Davies, 1 Q. B. 430; Blagrave v. Blagrave, 4 Ex. 550.

<sup>(</sup>u) 46 & 47 Viet. c. 52 (Bankruptey Act, 1883), s. 44. It may be conveniently mentioned here that on the conviction of a trustee the trust property does not vest in the administrator appointed under the Forfeiture Act, 1870. See Trustee Act, 1893, s. 48.

<sup>(</sup>x) Ex parte Barry, 17 Eq. 113; Ex parte Marsh, 1 Atk. 158. As to constructive trustees, see Ex parte Pease, 19 V. 46, and Whitefield v. Brand, 16 M. & W. 282.

(2) If he has converted it into money or other property, and such money or other property would be liable in the hands of the trustee, it will also be liable in the case of the trustee's bankruptcy (y).

Obs.—The only part of this rule which requires any illustration is sub-clause (2); but as the doctrine of following trust property into other property into which it has been converted is fully treated of in Division V. Chapter I. (infra), the reader is referred to that chapter.

Art. 32.—The Incidents of the Trustee's Estate at Law.

At law, the estate of the trustee is subject to the same incidents as if he were the beneficial owner, except where such incidents are modified by act of parliament.

ILLUST.—1. Power to commence actions.—Thus, he is the proper person to bring actions arising out of wrongs formerly cognizable by common law courts, and which necessitated the possession of the legal estate in those bringing them (z). But

(z) May v. Taylor, 6 M. & G. 261; and see R. S. C. 1883, Ord. XVI. r. 8.

<sup>(</sup>y) Frith v. Cartland, 2 H. & M. 417; Re Hallett, Knatchbull v. Hallett, 13 C. D. at p. 719.

this does not prevent a cestui que trust doing so if the trustee declines.

- 2. Curtesy and dower.—So, at law, the estate of the trustee in real property was liable to curtesy (a), dower (b), and, if of copyhold tenure, to freebench (c); but of course the persons so taking could only take as trustees for those beneficially entitled (d); and since the Conveyancing and Law of Property Act, 1881, the devolution of freehold trust estates is entirely changed, and dower and curtesy no longer attach. Formerly, the estate of a trustee was also liable to forfeiture and escheat, but there can no longer be forfeiture or escheat of a trust estate (e).
- 3. Trustees of copyholds must be admitted.—So, again, trustees of copyholds who take an *estate* must be admitted by the lord of the manor on the customary terms (f).
- 4. Trustees prove in bankrupteies.—Where a debtor to the trust estate becomes bankrupt, the trustee is the proper person to prove without the concurrence of the cestui que trust (g), unless in the case of a simple trust. Where it is as likely

<sup>(</sup>a) Bennett v. Davis, 2 P. W. 319.

<sup>(</sup>b) Noel v. Jevon, Fre. 43; Nash v. Preston, Cro. Car. 190.

<sup>(</sup>c) Hinton v. Hinton, 2 V. sen. 638.

<sup>(</sup>d) Noel v. Jevon, supra; Lloyd v. Lloyd, 4 Dr. & War. 354.

<sup>(</sup>e) 13 & 14 Vict. c. 60, s. 46; and see Trustee Act, 1893, s. 48.

<sup>(</sup>f) Wilson v. Hoare, 2 B. & Ad. 350. (g) Ex parte Green, 2 Dea. & Ch. 116.

as not that the debtor has paid the cestui que trust direct, then it lies in the discretion of the judge to require the concurrence of the cestui que trust (h).

- 5. Trustee liable for rates.—The trustee of a private trust is, as legal owner, liable to be rated in respect of the trust property (i).
- 6. Trustee of a business liable to creditors.—If the trustee, in pursuance of the trust, carry on a business for the benefit of the cestui que trust, he will yet be personally liable to the creditors of the business (k), and may be made a bankrupt (l).
- 7. Trustee entitled to custody of deeds.—A trustee in whom the legal estate is vested is entitled to the custody of the deeds (m); but the cestuis que trusts are entitled, at all reasonable times, to inspect them (n).
- 8. Not entitled to exercise franchise.—On the other hand, the ordinary legal incident of voting for members of parliament does not belong to the trustee in respect of the trust estate, as the act 6 & 7 Vict. c. 18, s. 74, confers that right on the beneficiary.

<sup>(</sup>h) Ex parte Dubois, 1 Cox, 310; Ex parte Gray, 4 Dea. & Ch. 778.

<sup>(</sup>i) Reg. v. Sterry, 12 A. & E. 84; Reg. v. Stapleton, 4 B. & S. 629.

<sup>(</sup>k) Farhall v. Farhall, 7 Ch. App. 123; Owen v. Delamere, 15 Eq. 134. But of course he has a right to indemnity, as to which see Art. 65, infra.

<sup>(</sup>l) Wightman v. Townroe, 1 M. & S. 412; Ex parte Garland, 10 V. 119; Farhall v. Farhall, supra.

<sup>(</sup>m) Evans v. Bicknell, 6 V. 174.

<sup>(</sup>n) Wynne v. Humberston, 27 B. 421.

Art. 33.—Trustee's Estate on Total Failure of Beneficiaries.

- (1) Where a trust does not exhaust the whole of the trust property, and there is no one in whose favour it can result, it is now held in trust for the Crown (p).
- (2) Where, however, the person to whom it would have resulted died before the 14th August, 1884, intestate, and without an heir, and the trust property is real estate, it belongs to the trustees in whom the legal estate in fee simple is vested, absolutely (q).

ILLUST.—1. Former law as to realty before August, 1884.—In the leading case of Burgess v. Wheate (q), the settlor conveyed real estate unto and to the use of trustees, in trust for herself, her heirs and assigns, to the intent that she should appoint, and for no other use whatever. She subsequently died without having appointed, and without heirs; and it was held that, there being holders of the legal estate—namely, the trustees—the crown could not claim by escheat, and that the

(q) Burgess v. Wheate, 1 Ed. 177; and Re Lashman, Moody v. Penfold, (1891) 1 Ch. 258.

<sup>(</sup>p) As to personal estate, see Taylor v. Haygarth, 14 Sim. 8; Middleton v. Spicer, 1 B. C. C. 201; and as to real estate, see 47 & 48 Vict. c. 71, s. 4.

trustees (no person remaining who could sue them in equity) retained, as the legal proprietors, the beneficial interest also.

- 2. Devise of equitable interest to another set of trustees.—But if the settlor in the last case had appointed or devised her equitable interest to C, in trust for purposes which could not take effect, then, as between the original trustees and C, the latter would be entitled to the property as the nominee under the will. The court would, as between those parties, only carry out the testator's directions, and would not inquire how far the directions could be executed in their integrity (r).
- 3. Old law applied to constructive trustees.—The rule also applied to a constructive trustee. Thus, a mortgagee in fee, whose mortgagor died intestate and without heirs, took the property absolutely, subject to the mortgagor's debts (s). Whether this would have been the case if the mortgagee had been a mere equitable mortgagee seems to be more doubtful; but it is submitted that, on the principle of Onslow v. Wallis, the result would have been the same as if he were the legal mortgagee.
- 4. New law.—However, the foregoing illustrations have no application where the person to whom the property would have resulted has died, without heirs and intestate, since the 14th August, 1884. For by the 4th section of the Intestates'

<sup>(</sup>r) Onslow v. Wallis, 1 M. & G. 506; and see Jones v. Goodchild, 3 P. W. 33.

<sup>(</sup>s) Beale v. Symonds, 16 B. 406.

Estates Act of that year, it is enacted, that "from and after the passing of this act, where a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply, in the same manner as if the estate or interest above mentioned were a legal estate in the same hereditaments."

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### CHAPTER III.

### THE TRUSTEES' DUTIES.

- ART. 34. Duty of Trustee on acceptance of Trust.
  - ,, 35. Duty of Trustee to obey the Directions of the Settlement.
  - ,, 36. Duty of Trustee to act impartially between the Beneficiaries.
  - ,, 37. Duty of Trustee to sell Wasting and Reversionary Property.
  - ,, 38. Duty of Trustee, as between Tenant for Life and Remaindermen, in relation to Wasting and Reversionary Property pending Sale.
  - ,, 39. Duty of Trustee in relation to the payment of Outgoings out of Corpus and Income respectively.
  - ,, 40. Duty of Trustee to exercise reasonable Care.
  - ",, 41. Duty of Trustee in relation to investment of Trust Funds.
  - ,, 42. Duty of Trustee to see that he pays Trust Moneys to right Persons.
  - ,, 43. Duty of Trustee not to delegate his Duties or Powers.
  - ,, 44. Duty of Trustees to act jointly where more than one.
  - ,, 45. Duty of Trustee not to set up jus tertii.
  - ,, 46. Duty of Trustee to act gratuitously.
  - ,, 47. Duty of Trustee not to traffic with, or profit by, the Trust Property.
  - ,, 48. Duty of Trustee to be ready with his Accounts.

ART. 34.—Duty of Trustee on acceptance of Trust.

A trustee must acquaint himself, as soon as possible, with the nature and circumstances of the trust property, obtain, where necessary, a transfer of the trust property to himself, and, subject to the provisions of the settlement, get in trust money invested on insufficient or hazardous security (a).

A person who undertakes to act as a trustee, takes upon himself serious and onerous duties; and when, as too often happens, he adopts a "policy of masterly inactivity," he entirely misapprehends the nature of the office to which he has been appointed. As Kekewich, J., said, in Hallows v. Lloyd (b), "What are the duties of persons becoming new trustees of a settlement? Their duties are quite onerous enough, and I am not prepared to increase them. I think that when persons are asked to become new trustees, they are bound to inquire of what the property consists that is proposed to be handed over to them, and what are the trusts. They ought also to look into the trust documents and papers, to ascertain what notices appear among them of incumbrances and other matters affecting the trust."

<sup>(</sup>a) Ex. gr. in trade, Kirkham v. Booth, 11 Bea. 273.
(b) 39 C. D. at p. 691. Precisely the same duties are binding on persons appointed original trustees.

A trustee is, however, not liable for mere ignorance of a material fact, if he could not have become acquainted with its existence from materials at his disposal (c). For trustees are not insurers, and their conduct ought to be regarded with reference to the facts and circumstances existing at the time when they have to act, and which are known, or which ought to be known, by them at that time (d).

ILLUST. 1.—Inquiries as to acts of predecessors. -Thus a new trustee's first duty is to ascertain that the trust fund is properly invested, and that his predecessors have not committed breaches of trust which ought to be set right. For if, through not inquiring into such matters, the trust estate should suffer, he may be liable, although he himself took no part, and could have taken no part, in committing the original breaches of trust (e).

- 2. Must not allow property to remain under sole control of co-trustee.—A trustee who leaves the trust fund in the sole name, or under the sole control, of his co-trustee, will be liable if it be lost (f).
- 3. Should invest money so soon as possible.—A trustee who keeps money for an unreasonable length of time without investing it, is liable if it

<sup>(</sup>c) Youde v. Cloud, 18 Eq. 634.
(d) Re Hurst, Addison v. Topp, 67 L. T. 96.
(e) Harvey v. Olliver, 57 L. T. 239.

<sup>(</sup>f) Lewis v. Nobbs, 8 C. D. 591.

be lost, however pure his motives may have been (g).

4. Effect of not searching for notices of incumbrances.—A new trustee is liable to make good moneys paid by him bonâ fide to a beneficiary, if the papers relating to the trust comprise a notice of an incumbrance created by that beneficiary depriving him of the right to receive the money. For if the trustee had acquainted himself, as he was bound to do, with the trust documents and papers, he would have found what the true state of the case was (h). Where, however, no amount of search would have disclosed the notice, the trustee would of course not be liable, as his liability entirely depends upon his shirking the duty of search, which the law casts upon him (i). Moreover, he is not bound to inquire of the old trustees whether they have received notice of any incumbrances (j). Nor is he liable if he honestly, but erroneously (ex. ar., from forgetfulness), informs an intended incumbrancer that he has no knowledge of any prior incumbrance (k).

ART. 35.—Duty of Trustee to obey the Directions of the Settlement.

A trustee must fulfil the purposes of the trust, and obey the directions of the

<sup>(</sup>g) Moyle v. Moyle, 2 R. & M. 710.
(h) See Hallows v. Lloyd, 39 C. D. 686.
(i) Hallows v. Lloyd, supra.
(j) Phipps v. Lovegrove, 16 Eq. 80.
(k) Low v. Bouverie, (1891) 3 Ch. 82.

settlement, except so far as these directions—

- Are modified by the consent of all the beneficiaries, or by the authority of a competent court; or
- β. Are impracticable, illegal, or manifestly injurious to the beneficiaries.

This is the most important of all the rules relating to the duties of trustees. It is founded on common-sense, and overshadows and modifies all other rules, which must be read as if they contained an express declaration that they are subject to any provisions to the contrary contained in the settlement itself. As will be seen, however, in articles 56 and 57, the rule is subject to modification, if all parties beneficially interested are sui juris, and concur in putting an end to or amending the trust. For the beneficiaries collectively, being the only parties beneficially interested, are entitled, at any moment, to depose the trustee, and distribute the trust property between themselves as they may think fit. The rule is also subject to the power of the court to interpose on behalf of parties beneficially interested, who are not sui juris; and of course, as we have seen (1), it is not binding upon a trustee where the directions of the settlement are illegal. Another exception necessarily arises where the directions of the settlement are impracticable (ex. gr., if it directs an immediate

<sup>(</sup>l) Art. 10, supra.

sale, and no purchaser can be found). Lastly, an exception arises where it would be manifestly injurious to the beneficiaries to carry out the directions contained in the settlement.

ILLUST.-1. Neglect to purchase where directed to do so.—If trustees are, by the settlement, directed to call in trust moneys, and to lay them out on a purchase, and they fail to do so, and the fund is lost, they are liable for the loss so sustained (m).

- 2. Neglect to sell, where directed.—So, if a trustee for sale omits to sell property when it ought to be sold, and it is afterwards lost, although without any default on his part, he is liable for the loss which would not have happened had he not failed in performing an obvious duty (n).
- 3. Direction to invest on particular securities.— So, where the settlement orders trust funds to be invested on particular securities, the trustees are bound to invest in such securities or in those prescribed by statute (as to which, see infra, Article 41). But it would seem that if they are directed to invest in specified securities and none other, they may not now even invest in the securities authorized by the Trustee Act, 1893, s. 1, the powers of which are only exerciseable if not forbidden by the settlement. The former, repealed, statutory power contained no such restriction (o).

<sup>(</sup>m) Craven v. Craddock, W. N. (1868) p. 229.
(n) St. § 1269, n.
(o) Re Wedderburn, 9 C. D. 112, decided on the 11th section of Lord St. Leonards' Act, repealed by the Trust Investment Act, 1889.

4. Must observe conditions imposed on their discretionary powers.—So, where there are any conditions attached to the exercise of any of their functions, they must strictly perform those conditions. As, for instance, where they are authorized to lend to a husband with the consent of his wife. they cannot make the advance without first getting the required consent, even though they subsequently get it (n).

5. So where trustees were empowered to vary investments "with the consent of the tenant for life," and they sold consols, and first made an investment with such consent upon a contributory mortgage (which was not an authorized security), and subsequently called the money in, and without such consent reinvested it upon a mortgage which was an authorized one, it was held that, although there was no loss of capital, they were nevertheless bound to replace the consols which had since risen in price. For they sold the consols for the purpose of investing in an unauthorized security, which was contrary to the directions of the settlement; and then when they realized that investment, they reinvested the proceeds without the consent of the tenant for life, which was again contrary to the directions of the settlement; so that in both transactions they disobeyed the rule now under consideration, and consequently committed breaches of trust, and were therefore bound

<sup>(</sup>p) Bateman v. Davis, 3 Mad. 98; but see Stevens v. Robertson, 37 L. J., Ch. 499, where it was held that a consent as to the mode of investing the trust fund might be given, ex post facto.

to place the beneficiaries in the same position as they would have occupied if no such breach had been committed. In other words, to replace the consols which they had wrongly sold (q). As Fry, L.J., said: "In the first place this is not a case in which the investment (i.e., the first investment) was within the terms of the trust at all. The trust required that it should be invested in the names of the trustees. The investment was made, not only in the names of the trustees, but also of another set of trustees whose concurrence was required to every act of the mortgagees. Therefore it did not satisfy those terms. . . . . The only remaining question was this: whether the investment of 1879 [the second investment] was an investment which satisfied the requirements of the trust, because it was argued for the appellants that even if the consols were to be restored, they should be restored as at the date of 1879, and not the year 1887 when this action was brought. That of course turns on this question: was the mortgage of 1879 one that satisfied the requirements of the trust? As the case was presented to us, it did not satisfy the requirements of the trust, because it was not shown that the tenant for life had given his consent."

6. Cannot accelerate a trust for sale.—On the same principle, where an estate is given in trust for A. for life, and after his death upon trust for sale, the trustees cannot sell during the life of A.,

<sup>(</sup>q) Re Massingberd, Clark v. Trelawney, 63 L. T. 296; and see also Re Bennison, Cutler v. Boyd, 60 L. T. 859.

even with A.'s consent, unless of course all parties beneficially interested in remainder are sui juris and consent. For the settlor has prescribed the time at which the sale is to be made, and the trustees must follow out his direction (r). Indeed it has been held, that even the court has no jurisdiction to order an earlier sale (s); although, of course, if the trust were being administered by the court, and the court did in point of fact order an earlier sale, the trustee would not be liable for obeying the order, and the purchaser would get a good title under sect. 70 of the Conveyancing and Law of Property Act, 1881. It must also be pointed out that, notwithstanding such a trust. and notwithstanding the consequent inability of the trustees to sell during the life tenancy, it is now competent for the tenant for life himself to sell, under the provisions of the Settled Land Acts, 1882 to 1890, and to cause the purchasemoney to be paid to the trustees, they being (by virtue of their future trust for sale) trustees for purposes of those Acts, under sect. 16 of the Settled Land Act, 1890.

But see also Soper v. Arnold, 14 App. Cas. 429.
(s) Johnstone v. Baber, 8 B. 233; Blacklow v. Laws, 2
Ha. 40; Sunter v. G. W. Rail. Co., 23 W. R. 126; and

Carlyon v. Truscott, 20 Eq. 348.

<sup>(</sup>r) Leedham v. Chawner, 4 K. & J. 458; Want v. Stallibras, L. R. S Ex. 175; Re Bryant and Barningham, 44 C. D. 218; Re Head and Macdonald, 38 W. R. 657, in both of which two latter cases the Court of Appeal held that the purchaser was not bound to complete, even although the beneficiaries were willing to confirm the sale.

ART. 36.—Duty of Trustee to act impartially between the Beneficiaries.

A trustee must be impartial in the execution of his trust, and must not so exercise his powers as to confer an advantage on one beneficiary at the expense of another. In particular, where the capital of the trust property is in any way augmented, the augmentation accrues for the benefit of all the beneficiaries, and is accordingly to be treated as capital, and not as income (t).

ILLUST.-1. Powers of sale and purchase.-Thus. where trustees are empowered to sell real estate and to lay out the proceeds in the purchase of another estate, they would not be justified in selling to promote the exclusive interest of the tenant for life; but they must look to the intention of the settlement, and whether another and better purchase is practicable, and not merely probable; or at all events there must be some strong reasons of family prudence (u).

2. Trust to raise debts by sale of land.—Conversely, if lands be devised to trustees upon trust

<sup>(</sup>t) Re Barton, 5 Eq. 238; Re Bouch, Sproule v. B., 12

App. Cas. 385.
(u) Mortlock v. Buller, 10 V. 309; Mahon v. Stanhope, cit. 2 Sug. Pow. 412.

to sell for payment of debts, and subject thereto upon trusts for divers persons successively, the trustees must not raise the money by sale of the timber, for that would be a hardship on the tenant for life (x).

- 3. Trustees should not purchase woodland estate. -Where money is directed to be laid out in the purchase of land to be settled on a person for life. with or without impeachment of waste, with remainders over, the trustees should not purchase an estate with an overwhelming proportion of trees on it. For if the tenant for life be impeachable for waste, he would lose the fruit of so much as was the value of the timber; and if he be not impeachable, he could, by felling the timber, possess himself of a great part of the corpus of the trust property (y).
- 4. Trustees should not purchase mining property or advowson.—Under a similar trust to the foregoing, trustees should not purchase mining property, nor an advowson, both of which might give an undue preference to one beneficiary (z).
- 5. Choice of investments.—Again, where trustees have a choice of investments, they must not exercise that choice for the sole benefit of the tenant for life by investing upon a more productive but less secure property (a). And where any change of

<sup>(</sup>x) Davies v. Westcombe, 2 Sim. 425.

<sup>(</sup>y) Bingers v. Lamb, 16 V. 174. (z) Lew. 439. (a) Raby v. Ridehalgh, 7 D., M. & G. 104; and Stuart v. Stuart, 3 B. 430.

investment is to be made with the consent of the tenant for life, and he *improperly* withholds his consent, the court will compel him to give it (b).

6. Trustees must not exert influence against the interest of a beneficiary.—On the principle enunciated in the article now under consideration, trustees must not threaten to exert their influence with third parties to the prejudice of one of their beneficiaries, in order to coerce him into consenting to a disposition of the trust property more favourable to another of the beneficiaries than would be the case if the settlement were strictly performed. Thus, in Ellis v. Barker (c), a testator desired his trustees to give up his farm to his nephew, the plaintiff, if the landlord would accept him as tenant; and in that case he bequeathed to him the farming stock. He also gave some real property to the plaintiff, and gave legacies and annuities to the plaintiff's father and mother, and sisters, and other persons, including the trustees. One of the trustees of the will was steward to the landlord. There were hardly any assets to pay the legacies and annuities, if the plaintiff took the farming stock; finding which to be the case, the trustees represented the matter to the landlord, who left it to their decision whether the plaintiff should be accepted as tenant. They accordingly refused to let him be accepted, unless he executed a deed making over the devised real estate for the

<sup>(</sup>b) Costello v. O'Rourke, 3 Ir. Rep. Eq. 172.(c) 7 Ch. App. 104.

purpose of paying the legacies and annuities. On these facts it was held, that it was a breach of trust on the part of the trustees to endeavour to induce the landlord to refuse his consent to the plaintiff having the tenancy which the testator had, by his will, expressed his wish for him to have; and that the deed, having been obtained by means of a breach of trust, must be set aside; and that the trustees, having made the suit necessary, and having hostilely contested the plaintiff's right to relief, must pay the costs of the suit.

- 7. Augmentation of capital.—Where a company out of a reserve fund creates new capital, and allots it gratis among the old shareholders, any shares so allotted to trustees will be held by them as capital, and will not belong to the person entitled to the trust income (d).
- 8. Bonuses.—So where bonuses are paid as part of capital, they will be retained by the trustees; but where bonuses are mere expressions for extra dividends, this will not be the case. As Lord Justice Fry said in  $Re\ Bouch,\ Sproule\ v.\ B.\ (e)$ , in a passage quoted with approval by Lord Herschell in giving judgment on the same case in the House of Lords (f), "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend

<sup>(</sup>d) Re Bouch, Sproule v. B., 12 App. Cas. 385; Re Northage, Ellis v. Barfield, 60 L. J. Ch. 488.

<sup>(</sup>e) 29 C. D. 635, at p. 653. (f) 12 App. Cas. 385, at p. 245.

or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital "(g). The bonus of a quarter per cent. which was offered to the holders of consols and reduced threes as an inducement to convert their holdings into new  $2\frac{3}{4}$  per cents., was by the Conversion Act specially declared to be income and not capital.

9. Profit on realization of investments.—It need scarcely be pointed out that where, on a change of investment, trust securities realize more than was given for them originally, the profit accrues to the capital, and is not considered as income payable to the tenant for life. In the same way, where trustees of a mortgage debt foreclose, and subsequently sell the property for more than the debt, the balance is to be held by them as an augmentation to the capital of the trust fund. For as any diminution of the trust property would have

<sup>(</sup>g) See also Re Alsbury, Sugden v. Alsbury, 45 C. D. 237; and Re Northage, Ellis v. Barfield, 60 L. J., Ch. 488, in both of which bonuses were treated as income; whereas, in Re Bouch, Sproule v. B., supra, they were treated as corpus; and conf. Re Hopkins, 18 Eq. 696; Straker v. Wilson, 6 Ch. App. 503; Ibbetson v. Elam, 1 Eq. 188; and Browne v. Collins, 12 Eq. 586.

to be borne by all the beneficiaries, and would not fall on the tenant for life only, so it is only fair that any casual augmentation should belong to all, and not to the life tenant only.

10. A testator gave his estate upon the usual trusts for conversion, with power to postpone, and directed that, pending conversion, the income actually produced should be treated as income. Part of the residue consisted of shares in a company with 81. per share paid up. The company was reconstructed, and the new company paid 9l. 5s. for each of the old shares. The 1l. 5s. was the proceeds partly of the regular reserve fund, and partly of profits which the directors had retained to meet contingencies. Held, that the right of a tenant for life of shares is only to receive dividends and bonuses in the shape of dividends declared during his life, and that, although the 11. 5s. was profits, it was under the circumstances not payable as income (h).

11. Whether trustees can safely pay the share of one beneficiary before paying the others.—The question sometimes arises, whether trustees can safely pay the share of one beneficiary who has attained a vested interest in possession, before paying the other beneficiaries who may not have attained a vested interest, or whose shares, by reason of incapacity or otherwise, are not presently payable. If he does so, it may happen that by reason of subsequent depreciation of securities, the

<sup>(</sup>h) Re Armitage, Armitage v. Armitage, (1893) 3 Ch. 337.

balance retained by the trustee may be insufficient to pay the other beneficiaries in full, in which case the first beneficiary will have got more than the others. It appears, however, to be well settled that if, when the first payment was made, the trustees have, and retain in their hands, assets, which, fairly valued, are sufficient to meet shares which are not presently payable, but have to be held in trust, they are justified in paying other shares payable pari passu but payable at once, and are not liable if the assets so retained should, in the event, prove insufficient to pay the unpaid beneficiaries in full (i). For the conduct of trustees is regarded with reference to the facts and circumstances existing at the time when they had to act, and therefore, if they make the valuation impartially at the time, they are not liable for an unforeseen loss.

12. Whether trustees can appropriate particular securities to answer particular shares payable in futuro.—The question sometimes arises whether trustees of a will can treat their trust as severable into several trusts, appropriating specific securities to each, or whether they must treat the trust property as one undivided fund, until it becomes necessary, on the death of a life tenant, to pay and distribute his share among his children. For instance, where a testator settles money either in a specific sum or as a share of residue upon each of his daughters for life, with remainder for her chil-

<sup>(</sup>i) Per Lindley, L. J., Re Hurst, Addison v. Topp, 67 L. T. p. 99; Re Winslow, Frere v. Winslow, 45 C. D. 249; and Fenwick v. Clark, 4 De G., F. & J. 240.

dren, ought the trustees to treat the daughters' fortunes as one trust, or as several? If a severance and appropriation of securities be lawful, it may sometimes be convenient: but, on the other hand, the result may obviously be, that (by reason of the appreciation of one appropriated set of securities, or the depreciation of another, or by both such causes) one family may get less, and the other more than their due proportion of the entire fund. Where the form of the trust is a trust of specific sums (ex. gr., 1,000l. to be held upon trust for a testator's daughter A. for life, with remainder for her children equally, and 1,000%, to be held upon a similar trust for his daughter B. and her children), such appropriation is not only undoubtedly legitimate, but ought to be made (k). So where the form of the trust is to divide a testator's residuary estate between his children equally, the daughters' shares to be retained, and invested upon trust for them respectively for life, with remainder to their respective children, it is apprehended that if, when the appropriation is made, the securities are fairly valued and fairly appropriated, there can be no objection, and that when once the appropriation is made, the subsequent depreciation of one appropriated fund cannot be made good out of the appreciation of another. Where, however, the form of the trust is such,

<sup>(</sup>k) Fraser v. Murdoch, 6 App. Cas. 855; Re Walker, Walker v. Walker, 62 L. T. 449. But an appropriation of securities is only valid if the appropriated securities were both authorized and sufficient at the date of the appropriation; see Re Waters, W. N. 18.

that no immediate severance into shares is directed until a share of corpus becomes distributable, it would appear to be doubtful whether the authorities above referred to are applicable. In such a case it might well be argued that the settlor's intention was, that there should be a community of loss or gain between the beneficiaries who should for the time being be entitled to the trust fund or such part thereof as should for the time being remain undistributed. The point, however, does not seem to have been the subject of judicial decision, and undoubtedly the usual practice, both of trustees and of the court itself (in the administration of estates and trusts), has been to make no appropriation in such cases.

## ART. 37.—Duty of Trustee to sell Wasting and Reversionary Property.

Where the trust is for the benefit of several persons in succession, and the trust property is of a wasting nature, or is a future or reversionary interest, the trustee must convert the property into property of a permanent and immediately profitable character, unless:—

- a. The settlement contains a direction or implication to the contrary; or,
- β. The settlement confers a discretion on the trustee to postpone such

conversion, which he bonâ fide and impartially exercises; or,

7. The property in question is specifically settled.

The above rule, known as the rule in Howe v. Lord Dartmouth (1), is really only a corollary of the principle stated in Art. 36, viz., that the trustee must act impartially between the bene-For if wasting property (such as leaseholds, terminable annuities, and the like) were to be retained, the tenant for life would profit at the expense of the remaindermen; and if reversionary property were not converted, the remaindermen would profit at the expense of the tenant for life. It must, however, be borne in mind that the rule is based upon an implied or presumed intention of the settlor, and not upon any intention actually expressed by him; and courts of equity have consequently always declined to apply the rule in cases where the settlor has indicated an intention that the property should be enjoyed in specie, though he may not, in a technical sense, have specifically said so. The real question, therefore, in all such cases, is, whether the settlor has, with sufficient distinctness, indicated his intention that the property should be enjoyed in specie (m); for

<sup>(</sup>l) 2 W. & T. Lead. Cas. 262; and see also *Hinves* v. *Hinves*, 3 Ha. 609; and *Pickering* v. *Pickering*, 4 M. & C.

<sup>(</sup>m) Per Baggallay, L. J., Macdonald v. Irvine, 8 C. D. p. 112.

the burden of showing this lies upon the party who desires that the rule in Howe v. Lord Dartmouth should not be applied (n).

ILLUST. 1. Long annuities.—Where a testator's residuary estate was settled upon one for life, with remainders over, it was held that long, but terminable annuities, which formed part of it, ought to be sold, and the proceeds invested on permanent trust securities (o).

2. Leaseholds.—A testator gave to his wife the whole of the interest arising from his property, both real and personal, during her life, with remainders over. He died possessed of leaseholds, among other property. It was held that the widow was not entitled to retain the leaseholds, but that they must be sold and the proceeds invested in The Vice-Chancellor (Shadwell) said: stock. "As the will stands, there is nothing, on the face of it, preventing the application of the rule of law, that perishable property must be sold and converted into money, and invested in the funds, in order to produce the same interest to the remainderman as was enjoyed by the tenant for life (p).

3. Rule not applicable where contrary intention expressed.—As already stated, the rule in Howe v. Lord Dartmouth is subject to any contrary inten-

<sup>(</sup>n) Per James, L. J., same case.
(o) Tickner v. Old, 18 Eq. 422; Porter v. Baddeley, 5
C. D. 542; but see contra, Wilday v. Sandys, 7 Eq. 455, where, on the construction of the will, it was held that the trustees were authorized to hold long annuities.

<sup>(</sup>p) Benn v. Dixon, 10 Sim. 636.

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tion which may be expressed or implied in the settlement. Moreover, it is immaterial whether the contrary intention is imperatively expressed, or whether a discretion to convert or not is expressly given to the trustees; for the court will not interfere with a discretion expressly given, so long as trustees exercise it in good faith (q). Thus, in one case a testator gave his residuary estate, which included several leasehold houses (held upon short terms), to trustees, upon trust to pay the income to his wife for life, with remainder to his grandchildren, and gave his trustees power to retain any portion of his property in the same state in which it should be at his decease, or to sell and convert the same as they should think fit. It was held that the special power to retain existing investments took the case out of the general rule as to conversion of perishable property, and that the trustees were at liberty to retain the short leaseholds, and + acc 22 Both any other investments held by the testator, for home of account such period as they should think fit (r).

4. So, again, where the testator devised wasting property to trustees, upon trust to sell "when in their discretion they should deem it advisable," and directed that the rents and profits should, until sale, be applicable and applied in the same manner as the dividends or interests to arise from the investment of the sale moneys, it was held

(r) Gray v. Siggers, 15 C. D. 74.

<sup>(</sup>q) Gisborne v. Gisborne, 2 App. Ca. 300; Tabor v. Brooks, 10 C. D. 273.

that the trustees were not bound to sell until they deemed meet (s).

5. Rule not applicable where impliedly negatived. —The above cases are instances of an express intention that the trustees should have a discretion: but the same result will follow where that intention can be implied. Thus, a testator, after a specific bequest, gave all his residuary estate, both real and personal, to trustees (whom he also appointed executors), upon trust, so soon as conveniently might be after his death, to sell so much and such part thereof as they might think necessary for paying all his mortgage and other debts and funeral and testamentary expenses. He also directed the trustees, out of the moneys to arise from such sale and other his residuary estate, to pay debts, funeral and testamentary expenses, and to invest the balance, and to stand possessed of such investments, and all other his residuary estate and the income thereof, upon trust for several persons successively for their respective lives, with remainders over. Part of the testator's estate consisted of leaseholds which were subject to a mortgage. Shortly after his death, this mortgage was paid off by the trustees, and the leaseholds retained unsold. On this state of facts it was held, that, on the construction of the will, the trustees had a discretion as to what part of the

<sup>(</sup>s) Miller v. Miller, 13 Eq. 263; and see also Thursby v. Thursby, 19 Eq. 395; and Chancellor v. Brown, 26 C. D. 42, where the property consisted of a business.

testator's estate should be converted, and that the court could not interfere with such discretion (t).

- 6. So it has been held that an express direction for sale at a particular period, indicates an intention that there should be no previous sale (u); and a similar view has been taken of a direction to divide property after the death of the life tenant (x). And so, in some cases, it has been decided that a trust to pay rents to the tenant for life, where the testator has only leaseholds (y), or a direction that the trustees should give a power of attorney to the life tenant to receive the income (z). is a sufficient indication of a contrary intention to take the case out of the general rule.
- 7. A testator gave his residuary estate to trustees in trust to convert into money such parts thereof as should not at his decease consist of money, or be invested in any of the public funds or government securities, and to invest the same in such public funds or government securities as to them should seem most advantageous, and to pay the interest, dividends, and annual proceeds of such residue to his children in equal shares for their lives, and after their deaths upon other trusts. On the construction of these words it was held, that long annuities, of which the testator died possessed, fell within the

(t) Re Sewell, 11 Eq. 80.

<sup>(</sup>u) Alcock v. Sloper, 2 M. & K. 697; Daniel v. Warren, 2 Y. & C. C. C. 290.

<sup>(</sup>x) Collins v. Collins, 2 M. & K. 703.

<sup>(</sup>y) Goodenough v. Tremamondo, 2 B. 512; Cafe v. Bent, 5 Ha. 36; Vachell v. Roberts, 32 B. 140.

<sup>(</sup>z) Neville v. Fortescue, 16 Sim. 333.

exception of public funds or government securities. and ought not to be converted (a). On the other hand, in Tickner v. Old (b), where the direction was to convert the residue and invest in government or real securities, with power to continue invested any government stocks or real securities of which the testator might die possessed, it was held that government securities meant only such as were of a permanent character, and that long annuities ought to be converted. It will be perceived that it is not easy to distinguish these two cases, which convey a warning to the practitioner how extremely dangerous it is to advise trustees to act upon implied intentions, either one way or the other, without taking the opinion of the court on originating summons.

8. Property given specifically.—Although the mere absence of a direction to convert wasting property has never been construed to mean that it should be enjoyed in specie, yet, where such property is given specifically in the strict sense of the term, i.e., where it is expressly referred to, the rule has no application. For in such cases, in the absence of express direction, the presumption is, that the testator, by naming the specific property, intended that it should be enjoyed in the shape in which he left it. If, therefore, a testator bequeaths specific leaseholds in trust for persons successively,

 <sup>(</sup>a) Wilday v. Sandys, 7 Eq. 455.
 (b) 18 Eq. 422; and see also Porter v. Baddeley, 5 C. D. 542.

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it will not be the duty of the trustees to sell them and invest the proceeds on permanent investments; but they must pay the entire rents to the first taker, notwithstanding that, by reason of the terminable nature of the property, the ultimate remainderman may be disappointed (c). This distinction between specific trust bequests and residuary trust bequests is well exemplified by the case of Macdonald v. Irvine (d). There a testator, being possessed of (among other things) a leasehold house held for lives, and a policy for 3,000% on one of the lives, gave the leasehold house and the policy to J. M., and the residue of his estate to A. L. After making this will, he married, and, by a codieil, gave to his wife for her life the income, dividends, and annual proceeds of his entire estate, and postponed the payment of all legacies, and the distribution of all estates vested in him till after her death; and subject thereto, he confirmed his will. It was held that the gift of the leasehold house and policy to J. M. being specific, the intention of the testator was, that they were to be enjoyed in specie; but that with regard to his residuary estate (which comprised other wasting property), the rule in Howe v. Lord Dartmouth must be applied (e).

<sup>(</sup>c) Re Beaufoy, 1 Sm. & Giff. 20.
(d) 8 C. D. 101.
(e) Baggallay, L. J., diss.

ART. 38.—Duty of Trustee as between Tenant for Life and Remainderman in Relation to Property which ought to be converted.

Where property ought to be converted, (either by express direction or under Article 37), and the proceeds invested, the tenant for life is, pending such conversion, entitled to receive either the whole or some part of income-bearing property, and to be credited with income in respect of reversionary property, in accordance with the following rules, viz.:—

 $\alpha$ . He is entitled to the whole income of income-bearing property if the settlement so directs or implies (f).

β. Where the property is of a wasting nature (and, semble, even where it is not), if there is no express power to postpone conversion, but the property cannot be sold, he is only entitled to such interest as would be produced if the property were actually sold, and the proceeds invested in trust securities. If, how-

<sup>(</sup>f) See Re Sheldon, Nixon v. Sheldon, 39 C. D. 50; Re Thomas, Wood v. Thomas, (1891) 3 Ch. 482. Where the property is of a non-wasting nature, the Court will accept very slight evidence of implied intention.

ever, there is an express power to postpone conversion until a suitable opportunity occurs, he is entitled to interest after the rate of 4 per cent. per annum (g).

- 7. Where the property is of a reversionary nature, he is entitled, when it falls in, to a proportionate part of the capital, representing 4 per cent. compound interest (with yearly rests) on the true actuarial value of the property at the testator's death, calculated on the assumption that the actual date when the property fell into possession could have been then predicted with certainty (h).
- δ. Where the trustees are mortgagees in possession of property which is believed to be an insufficient security, then, pending realization, the income, less 4 per cent., is to be treated as capital, and the 4 per cent. as income. But upon complete realization of an insufficient security, the money realized, plus the income received by the tenant

<sup>(</sup>g) Brown v. Gellatly, 2 Ch. App. 751.(h) Re Earl of Chesterfield, 24 C. D. 643.

for life, must be divided between tenant for life and remaindermen in the proportion of the sums which ought to have been received for income and capital respectively if no default had been made; the tenant for life giving credit for what he has actually received (i).

This article is a further corollary of Art. 36, and the main principle of it forms the second part of the rule in Howe v. Lord Dartmouth, viz., that, primâ facie, pending a conversion which ought to be made, the tenant for life is entitled to the income which would be produced by the proceeds of the conversion, if it were made, and nothing more. The rule is, like so many equitable rules, founded on the maxim that equity regards that as done which ought to be done, and consequently has no application where, on the true construction of the settlement, the wasting or reversionary property is not to be converted; nor does it apply where the trustees have a discretion in the matter, and it appears to have been intended that, until conversion, the income should be enjoyed in specie. Where, on the other hand, there is merely a power to postpone conversion for the purpose of selling the property to the best advantage, and no intention is indicated that the power is inserted for the benefit of the tenant for life as against the remainderman,

<sup>(</sup>i) Re Godden, Teague v. Fox, (1893) 1 Ch. 292.

the rule applies. However, unless the settlement is very explicit, trustees should always be advised to take the opinion of the court before paying income to a tenant for life in specie.

ILLUST.-1. Settlement directing that income is to be enjoyed in specie.—Where a testator devised his brickfield (which was, of course, property of a wasting nature) to trustees upon trust to sell when, in their discretion, it might seem advisable, and directed that the rents and profits should, until sale, be considered as part of his personal estate, and be applicable and applied in the same manner as the dividends or interest to arise from the investments of the sale moneys, it was held that the tenant for life was entitled to the whole of the royalties paid by tenants of the brickfield, although the trustees did not sell the property for ten years (j). If, however, the italicized words had not been inserted in the will, it seems plain that the power to postpone conversion would not of itself have authorized the payment of the whole of the royalties to the tenant for life. For, in that case, the inference would have been, that the power to postpone conversion was for the purpose of efficiently selling the estate, and not for the benefit of the tenant for life (k). The question is, in short, one of construction in all these cases, viz.,

(k) Re Carter, 41 W. R. 140; Brown v. Gellatly, 2 Ch.

App. 751.

<sup>(</sup>j) Miller v. Miller, 13 Eq. 263; and see also Thursby v. Thursby, 19 Eq. 395, where the whole of colliery royalties were held to be payable to the tenant for life.

whether the testator intended that the power to postpone should be exercised for the benefit of the tenant for life, or merely for the more convenient realization of the estate.

- 2. Settlement implying that income is to be enjoyed in specie.—A testator empowered his trustees, at their discretion, to continue all or any part of his personal estate in the state of investment in or upon which the same should be at his death, or otherwise to convert the same, and to invest the proceeds in the names of the trustees in certain specified securities. At the death of the testator, part of his personal estate consisted of securities not specifically authorized. In an action for the administration of the estate, the chief clerk found that some of the securities were proper to be continued, and that others were proper to be called Held, that the tenants for life were entitled to receive in specie the income of those securities which were retained (1). It will be perceived that the testator authorized the continuance of securities. and not merely the postponement of their conversion, otherwise it is conceived that the decision might have been different.
- 3. Another good example of an implied intention that income should, pending conversion, be enjoyed in specie, is afforded by the recent case of *Re Thomas*, *Wood* v. *Thomas* (m). There a testator

<sup>(</sup>l) Re Sheldon, Nixon v. Sheldon, 39 C. D. 50; and see also as to rents of leaseholds, Gray v. Siggers, 15 C. D. 74.

<sup>(</sup>m) (1891) 3 Ch. 482.

gave his residuary estate to trustees upon trust for conversion and investment of the proceeds in specified securities, with power to the trustees in their absolute discretion to retain any securities or property belonging to him at his death, unconverted, for such period as they should think fit, and declared that they should stand possessed of "the stocks, funds, shares, and securities for the time being constituting or representing the residuary personal estate and effects thereinbefore bequeathed, and of the income thereof," upon trust to pay the income to certain persons for life with remainders over. The estate comprised certain American bonds, which were not included among the securities authorized by the will as investments, but were retained by the trustees in exercise of the discretion given to them. These bonds, which bore 6 per cent. interest, were redeemable at par at a future date, and their market value was considerably above par. Held, that, on the true construction of the will, the tenants for life were entitled to the whole income of the bonds in specie. In giving judgment, Mr. Justice Kekewich made the following remarks, which very lucidly set forth the law on the subject. His Lordship said: "I am not prepared to hold, that, where there is a direction for conversion of personal estate, followed by a power of retention of existing securities in the absolute discretion of the trustees, and then there are trusts for tenants for life, and afterwards for remaindermen, the power of retention necessarily gives the tenants for life the

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enjoyment in specie of the securities retained by the trustees in the exercise of their discretion. I believe that so to hold would be against the law as laid down in many cases and many text-books, and against the practice of conveyancers, who, I believe, have invariably provided for the rents and profits of property given in trust for sale being paid to the tenant for life where that was intended; and I think that no such doctrine receives any support from the decisions of Mr. Justice North in Re Sheldon (n), and Lord Cairns in Brown v. Gellatly (o). I do not think either Mr. Justice North or Lord Cairns intended to decide, or did decide, any abstract question of the kind. But I have no doubt that one looks out with an expectant eye for a direction that the tenant for life shall receive the income when there is an express direction to the trustees to retain securities, or any indication of the testator's intention that they shall retain indefinitely for so long as they may think fit."

4. Realty was settled upon trust to sell and invest the proceeds, and to pay the dividends to B. for life, with certain limitations over after his death. There was no direction as to payment of the intermediate rents pending sale. The land was sold without undue delay, but, pending the sale, the rents produced more than 4 per. cent per annum on the amount realized on the sale. On

<sup>(</sup>n) 2 Ch. App. 751. (o) 39 C. D. 50.

these facts it was held by Kekewich, J., that, notwithstanding the absence of any power to postpone the sale, or any direction as to the interim rents, the whole rents belonged to B. the tenant for life (p). His Lordship carefully rested his judgment upon implied intention, and not upon any rule of law differentiating real estate which ought to be converted, from personal estate subject to a like trust. It is, however, difficult to understand how any such implied intention was found in this case, apart from the obvious convenience of the decision; and if convenience is to be the test of intention, it would seem to follow that such intention should be implied in every case where land is directed to be sold, unless the contrary is expressed. In other words, that the onus of proving intention in the case of land is reversed, and shifted from the shoulders of the tenant for life to those of the remaindermen. The learned judge was also careful to limit the extent of his judgment to cases where no undue delay had taken place, and no depreciation was proved.

5. Tenant for life not entitled to whole income of destructible property or unauthorized investments if settlement silent.—In the leading case of Brown v. Gellatly (q), the testator, who was a shipowner, directed his trustees to convert his personal estate into money, when and in such manner as they should see fit, and gave them power to sail his

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<sup>(</sup>p) Hope v. D'Hédouville, (1893) 2 Ch. 361.
(q) 2 Ch. App. 751; and see also Hume v. Richardson,
4 De G., F. & J. 29.

ships until they could be disposed of satisfactorily. The proceeds of his personal estate were then settled upon tenants for life with remainders over. The will contained a wide power of investment in specified securities. On his death the testator possessed (1) numerous ships; (2) securities falling within those authorized by the will; and (3) shares and investments not so authorized. The ships could not be immediately sold, nor could the unauthorized securities. Both, pending sale, produced a high rate of income; and the question arose, whether the tenants for life were entitled to the whole of that income, or only to some, and if so, what, proportion thereof? In giving judgment, Lord Cairns said: "We find no indication whatever of an intention that the ships were to remain unconverted for any specific time. testator, who had been engaged in the shipping business, knew perfectly well, and shows that he knew, that some time would necessarily be taken in converting the ships; and therefore he very wisely provided that, until they were sold, the executors should have a power (which otherwise they would not have possessed), viz., the power to sail the ships for the purpose of making profit. But, in giving that power, he does not give it as a power to be exercised for the benefit of the tenant for life as against the parties in remainder, or for the benefit of the parties in remainder as against the interest of the tenant for life, but says that it is to be exercised for the benefit of the estate, meaning, as I apprehend, for

the benefit of the estate generally, without disarranging the equities between the successive takers. In that state of things, it seems to me that the case falls exactly within the third division pointed out by Sir James Parker, in the case of Meyer v. Simonsen (r), and that a value must be set upon the ships as at the death of the testator, and the tenant for life must have 4 per cent. on such value, and the residue of the profits must of course be invested and become part of the estate. Then, secondly, as to the authorized securities, the tenant for life is, in my opinion, entitled to the specific income of the securities, just as if they had been 3 per cent. consols. I understand the words of the will as amounting to the constitution by the testator of a larger class of authorized securities than this court itself would have approved of, and the court has merely to follow his directions, and treat the income accordingly, as being the income of authorized securities. Then comes the third question in the case, the securities not ranging themselves under any of those mentioned in the last clause of the will. As they do not come within the class of authorized securities, it was the duty of the trustees to convert them at the earliest moment at which they properly could be converted. I do not mean to say that the trustees were by any means open to censure for not having converted them within the year after testator's death, but I think that the

<sup>(</sup>r) 5 De G. & S. 723.

rights of the parties must be regulated as if they had been so converted. I think the proper order to make, is that which was made in Dimes v. Scott (s), followed by V.-C. Wigram in the case of Taylor v. Clark (t), namely, to treat the tenant for life as entitled, during the year after the testator's death, to the dividends upon so much 3 per cent. stock as would have been produced by the conversion and investment of the property at the end of the year." It will be perceived that his Lordship speaks of 3 per cent. stock as the proper measure of the interest to be paid to the tenant for life in respect of the unauthorized securities pending sale. Whether, however, this holds good since consols were converted to  $2\frac{3}{4}$  per cent., and a larger range of securities authorized for the investment of trust funds, appears somewhat questionable. It is however submitted that consols, being the stock most favoured by the court, would still be the criterion of what the tenant for life ought to be allowed (u).

6. Tenant for life entitled to part of corpus of non-income bearing property when realized.—In the above cases, the income actually received by the trustees exceeded that which they were authorized to pay to the tenant for life; but the same principle applies in favour of the tenant for life, where the property is not presently saleable or

<sup>(</sup>s) 4 Russ. 195. (t) 1 Ha. 161.

<sup>(</sup>u) See per Kekewich, J., in Hope v. D'Hédouville, (1893) 2 Ch. at p. 368.

realizable except at an unreasonable loss, and, pending realization, produces no income. instance, where part of the estate consists of a policy of assurance on another's life, which does not fall in for some years after the testator's death, it would be unfair to the tenant for life that he should lose all the intervening income. In such cases, when it does fall in, the money must be apportioned, as between capital and income, by ascertaining the sum which, put out at 4 per cent. per annum on the day of the testator's death, and accumulated at compound interest with vearly rests, and deducting income tax, would. with the accumulations, have produced the amount actually received. The sum so ascertained must be treated as capital, and retained by the trustees; but the residue is income, and must be paid to the tenant for life (x).

7. Income derived from property of which testator was mortgagee in possession.—Where part of a testator's residuary estate consisted of a colliery of which he was mortgagee in possession, the question arose as to how accumulations of the income, derived from working the colliery since the testator's death, were to be apportioned between tenant for life and remaindermen. It was held that the proper principle was, that so much as would, if invested at the testator's death at 4 per cent. with yearly rests, have amounted to

<sup>(</sup>x) Re Earl of Chesterfield, 24 C. D. 643; and see also Massy v. Gahan, 23 L. R. Ir. 518.

the sum in the hands of the trustees, should be treated as capital and the rest as income (y). In other words, the income received from the colliery, less 4 per cent., was considered as received on capital account, the 4 per cent. being paid to the tenant for life without prejudice to his rights to further allowances on account of interest in the event of the colliery being realized.

8. Corpus realized by insufficient security where interest in arrear.—Where a trust security turns out to be insufficient upon realization, and interest is in arrear, it is obvious that to attribute the whole amount realized to capital account would be unduly favouring the remaindermen at the expense of the tenant for life whose income is in arrear. In such cases, therefore, the security is treated as if it had been a security for the amount realized, plus the interest which has actually been received by the tenant for life. The sum thus ascertained is then divided between tenant for life and remaindermen, in the proportion which the interest (at the stipulated rate) which the tenant for life ought to have received, bears to the capital sum which was secured by the mortgage, the tenant for life giving credit for all income actually received by him (z).

<sup>(</sup>y) Re Godden, Teague v. Fox, (1893) 1 Ch. 292.
(z) Re Foster, Lloyd v. Carr, 45 C. D. 629; Re Ancketill, 27 L. R. Ir. 331.

ART. 39.—Duty of Trustee in relation to the payment of outgoings out of Corpus and Income respectively.

Subject to the directions of the settlement, and of particular statutes—

- a. The corpus bears capital charges, and the income bears the interest on them (a).
- β. The income bears current expenses incident to the possessory ownership of property (b) except the cost of repairs (c).
- 7. Where repairs are necessary (d), 1. Holding or fines become payable for the L'clim's renewal of leases (e), application Carv Court Co should be made by the trustees to the court, which will give directions for the raising of money to pay for

<sup>(</sup>a) Marshall v. Crowther, 2 C. D. 199; Whitbread v. Smith, 2 D., M. & G. 741; and see and consider Norton v. Johnstone, 30 C. D. 649.

<sup>(</sup>b) Fountain v. Pellet, 1 V. jun. 337, 342, rates and taxes; Shore v. Shore, 4 Drew. 510, receiver's commission and expenses of passing accounts.

<sup>(</sup>c) Re Courtier, Coles v. Courtier, 34 C. D. 136. (d) Per Cotton and Lindley, L.JJ., Re Hotchkys, Freke

v. Calmady, 32 C. D. 408.

<sup>(</sup>e) Seton on Decrees, 4th ed. 1270; White v. White, 9 V. 556; Nightingale v. Lawson, 1 B. C. C. 440. The law as between tenant for life and remaindermen in respect to renewal of leases is not altered by sect. 19 of the Trustee Act, 1893 (Re Baring, Jeune v. Baring, (1893) 1 Ch. 61).

them in such a way as to distribute the burden equitably between income and corpus.

 $\delta$ . All costs incident to the protection of the trust property, including legal proceedings, are borne by corpus (f) unless they relate exclusively to the tenant for life (g).

ILLUST. — 1. Express direction. — A testator created a trust of certain leasehold property, to which was annexed a perpetual right of renewal from time to time, on payment of a fine. The will directed the trustees to renew the leases "out of the annual rents and profits," but empowered them, in case from any cause the money required to pay the fines should not be produced "by the ways and means aforesaid," to mortgage the property for the purpose of raising the fines. On these facts it was held that, the rents being sufficient for the purpose, the fines ought to be paid out of income (h). The Master of the Rolls, in giving judgment, said:-"I think, on the construction of this deed, that renewal fines are payable out of income. I think the words in the first part of the deed are clear, that the trustee shall

<sup>(</sup>f) Lord Brougham v. Poulett, 19 B. 135; Sanders v. Miller, 25 B. 154; Re Earl De la Warr's Estates, 16 C. D. 587; Stott v. Milne, 25 C. D. 710; explained by Andrews v. Weall, 37 W. R. 779.

<sup>(</sup>g) See Re Marner, 3 Eq. 432; Re Evans, 7 Ch. App. 659; Re Smith, 9 Eq. 374.

<sup>(</sup>h) Selby v. Wood, 29 B. 482.

pay the fines, fees, and expenses attending such renewal from time to time 'by and out of the annual rents, issues, and profits of the said hereditaments, parts, shares, and premises.' This case is distinguishable from Allan v. Backhouse (i), where the direction was to raise it out of rents and profits. Here it is to pay it out of the annual rents, issues, and profits. I also think that the subsequent provision does not give the trustee the option of raising the fines out of the rents or by mortgage, as in Jones v. Jones (k). Here it is impossible to say that the money has not been produced 'by the ways and means aforesaid.' The proviso gives power to raise the fines by mortgage in three cases:—(1) If the money shall not be produced; (2) in case the trustee requires money to pay off the mortgages; or (3) in case he requires it otherwise in connection with the trusts of these presents. That means in matters other than and besides those previously enumerated. I am of opinion, therefore, that the case of Jones v. Jones does not apply here. There the direction was to pay the fines either out of the rents or by mortgage, in which case the trustees had a discretion."

2. Statutory indication.—By the 32nd section of the Succession Duty Act (l) personal property settled upon different persons in succession is to be

<sup>(</sup>i) 2 V. & B. 65, in which it was held, that as a gift of rents was equivalent to a gift of corpus, so a direction to renew out of rents was equivalent to a direction to renew out of corpus.

<sup>(</sup>k) 5 Ha. 441.

<sup>(1) 16 &</sup>amp; 17 Vict. c. 51.

treated, for the purposes of the act, as if it were bequeathed by the predecessor to the successor. The effect of this provision is, that the duty is a charge on capital, and where a tenant for life pays the duty he is, primâ facie, entitled to a charge on the capital for the amount he has thus paid (m). On the other hand, succession duty on real estate is clearly payable out of income, by reason of the provisions of sect. 21. Again, compensation payable to an outgoing tenant under the Agricultural Holdings Act, 1883, is, by section 29, to be charged on corpus and income equitably, as the County Court judge may direct.

3. Charges and incumbrances.—Where a capital sum is secured on property, it is payable out of corpus, but the interest on it is payable out of income (n). And this rule obtains even where a debt is secured by, or is payable as, an annuity. In such a case the annuity must be valued, and the tenant for life will then contribute an amount equal to interest on the valuation at 4 per cent. (o). Arrears of interest on incumbrances accrued in the lifetime of the settlor, are a charge on corpus, the tenant for life merely paying interest on them (p).

<sup>(</sup>m) Cudden v. Cudden, 4 C. D. 583.

<sup>(</sup>n) Marshall v. Crowther, 2 C. D. 197; Whitbread v. Smith, 3 D., M. & G. 741; and see Allhusen v. Whittell, 4 Eq. 295.

<sup>(</sup>o) Bulwer v. Astley, 1 Ph. 422; Playfair v. Cooper, 17 B. 187; Ley v. Ley, 6 Eq. 174; Re Muffett, Jones v. Mason, 39 C. D. 534 (purchase-money consisting of a life annuity); and Re Bacon, Grissell v. Leathes, 68 L. T. 522.

<sup>(</sup>p) Revel v. Watkinson, 1 V. 93; Playfair v. Cooper, 17 B. 187.

- 4. The strong inclination of the court to saddle capital charges on corpus, is well exemplified by the recent case of Norton v. Johnstone (a). There. a testator had directed the income of certain estates to be accumulated until the amount of the accumulations should be sufficient to pay off existing mortgages, and that, subject thereto, the property should be held to the use of the plaintiff for life. with remainders over. Before the accumulations were sufficient to discharge the mortgages, the mortgagees sold a part of the property, and, with the moneys so produced, and part of the moneys already accumulated, the mortgages were paid off. The tenant for life then claimed to be let into possession, and also to have the balance of the accumulations paid to him. On the other hand, the remainderman urged that, inasmuch as the mortgage debt had been paid off by means of a sale of the corpus, which was not what was contemplated by the testator, the accumulation of rents ought to continue, until such a sum was obtained as would be equal to the amount raised by the sale, and that the sum thus obtained ought to be employed in recouping the inheritance, the tenant for life receiving only the interest of it. Mr. Justice Pearson, however, decided in favour of the tenant for life, on the ground that the mortgage debts had been paid in a way different from that which

<sup>(</sup>q) 30 C. D. 649; and see also Townson v. Harrison, 43 C. D. 55.

the testator intended, and that he had not provided for that event, and that consequently the ordinary rule as to the incidence of capital charges must govern the case.

Where, however, on the expiration of a lease granted by the settlor, the tenant for life is obliged to pay compensation for improvements to the outgoing lessee under a covenant in the lease, he has no claim to saddle the compensation on corpus. For as Jessel, M. R., said: "If he lives long enough he will let the land again, and get the outlay from the incoming tenant, and so if he recovered it now he would be repaid twice over" (r). However, this does not apply to compensation payable under the Agricultural Holdings Act, 1883, as the incidence of such compensation is expressly provided for by section 29 of that Act.

5. Calls on shares.—Calls on shares which form part of a trust estate, are outgoings attributable to capital and not to income, and are accordingly payable out of corpus (s).

6. Current annual charges.—All charges of an annual character, except annual charges to secure capital sums, are payable out of income, for otherwise the corpus would inevitably decrease year by year, and would eventually be swallowed up. Thus, the income must bear rates and taxes (t), the rent payable for leasehold hereditaments,

<sup>(</sup>r) Mansel v. Norton, 22 C. D. 769.

<sup>(</sup>s) Todd v. Moorhouse, 19 Eq. 69. (t) Fountain v. Pellett, 1 V., jun. 337, 342.

annuities charged on income (u), the commission or poundage payable to a receiver, and the expenses incident to the preparation and passing of his accounts (x). So where a life policy forms part of the settled property, the premiums are payable out of income and not capital (y). On the same ground, where a rent-charge is redeemed by the tenant for life, he is only entitled to be recouped, out of corpus, the amount paid, less the value of the redemption to his life estate (2). Where trustees are directed to insure the trust property against loss or damage by fire, the premiums must be borne by income. Up to the end of 1888, it was questionable whether trustees could lawfully expend trust moneys in insuring against loss or damage by fire. However, by section 18 of the Trustee Act. 1893, trustees are authorized to make such insurances to any amount not exceeding three-fourths of the value of the building or property insured, and to pay the premiums out of income; but the section does not apply to simple trusts.

7. Losses on trust business.—Where a business is vested in trustees in trust for successive tenants for life and remaindermen, the net losses on one year's trading must, under ordinary circumstances, be made good out of the profits of subsequent

<sup>(</sup>u) Pine v. Cooper, 17 B. 187, 193; Miller v. Huddleston, 3 M. & G. 513.

<sup>(</sup>x) Shore v. Shore, 4 Drew. 510.

 <sup>(</sup>y) Re Waugh, 25 W. R. 555.
 (z) Re Duke of Leinster, 21 L. R. Ir. 152.

years, and not out of capital (a). For the outgoings of a business are part of the regular current expenses, and there can be no profits until all losses are paid, whether such losses are incurred in a year in which gross profits exceed the losses, or were incurred in prior years. The same rule, however, does not seem to apply where a business is not carried on under a direction in the settlement, but is merely carried on temporarily until it can be sold profitably. In such cases, the annual loss or profit (if any) ought to be apportioned between capital and income, by calculating the sum which, put out at interest at four per cent. per annum on the day when the business ought to have been sold, if it could have been, and accumulating at compound interest at the like rate, with yearly rests, would, together with such interest and accumulations, after deducting income tax, be equivalent at the end of each year to the amount of the loss or profit sustained or made during that year, and then charging the sum so ascertained against, or crediting it to, capital, and charging the rest of the loss against, or crediting the rest of the profit to, income (b).

8. Secus where intention can be implied that losses shall be borne by capital.—However, where, on the facts, it appears to have been the settlor's intention, that losses on a trust business should be borne by capital, effect will be given to that

trice :

<sup>(</sup>a) Upton v. Brown, 26 C. D. 588.
(b) Re Hengler, Frowde v. Hengler, (1893) 1 Ch. 586.

intention. For instance, where partners carry on a business, each partner having the right to bequeath his share, and it has been the partnership custom to write off the losses of unprosperous years from each partner's share of capital, that custom will be continued, even as between a tenant for life and remainderman, in whose favour one of the partners has bequeathed his share (c). As Pearson, J., put it: "As I understand the will, he | the testator] intended that the business should be carried on in the same way in which it was carried on during his lifetime, with such modifications only as the change of circumstances would render necessary, and which, in the discretion of the trustees, acting under the powers given to them by his will, they might agree to. Subject to that, I conclude, from the terms of the will, that the testator's intention was that the business should proceed as it had proceeded, and that the daughter should be entitled to one moiety of those profits which he himself would have received if he had lived and had continued to be a partner in the business."

9. Repairs.—Very generally, well drawn settlements of house property provide that the trustees shall keep it in repair, and insured against loss or damage by fire, out of the rents and profits. Where this is omitted, a tenant for life, whether legal (d)

<sup>(</sup>c) Gow v. Forster, 26 C. D. 672. (d) Re Cartwright, Avis v. Newman, 41 C. D. 532, over-ruling the so-called doctrine of permissive waste.

or equitable (e), is not compellable to keep the property in repair, and, not infrequently, the consequence is extremely embarrassing and prejudicial to all parties. In the case of legal estates the court, apparently, has no jurisdiction to make any order charging the cost of repairs, or any part of it, on corpus (f). Where, however, the legal estate in fee is in the trustees (at all events where they have a power of, or trust for sale (g), it would seem that the court has jurisdiction to make an order empowering them to raise money for making repairs necessary for the preservation of the property (h), or even for erecting additional buildings necessary for rendering the property tenantable or saleable (i), and apportioning the cost equitably between income and corpus (k). Indeed, it has been held that trustees may, without any order, do such repairs to leasehold property as are necessary to prevent a forfeiture of the lease (1), and to repay themselves out of income (1), but without prejudice to the rights of tenant for life and

<sup>(</sup>e) Re Courtier, Coles v. Courtier, 34 C. D. 136.

<sup>(</sup>f) Re De Teissier, De Teissier v. De Teissier, (1893) 1 Ch. 153.

<sup>(</sup>g) See per Chitty, J., Re De Teissier, De Teissier v. De

Teissier, supra.
(h) See per Cotton and Lindley, L.JJ., Re Hotchkys,
Freke v. Calmady, 32 C. D. 408; Re Courtier, Coles v. Courtier, 34 C. D. 136; but see contra Hibbert v. Cooke, 1 S. & S. 552; and Dent v. Dent, 30 B. 363.

 <sup>(</sup>i) Conway v. Fenton, 40 C. D. 512; Re Household, 27
 C. D. 553; and see Drake v. Trefusis, 10 Ch. App. 364, and Frith v. Cameron, 12 Eq. 169.

<sup>(</sup>k) Re Hotchkys, Freke v. Calmady, supra. (l) Re Fowler, Fowler v. Odell, 16 C. D. 723.

remaindermen inter se (m). But this was expressly on the ground that trustees may expend money by way of salvage, and they have a lien both on income and corpus for expenses properly incurred by them as will be seen later on (n). However, the practitioner is emphatically warned that it would be highly dangerous to advise trustees to take any such responsibility upon themselves without the direction of the court (which can now be obtained on originating summons); for if they should be afterwards attacked, either by tenant for life, or particularly by the remainderman, it might be very difficult to prove (and the onus of proof would be on the trustees) that the expenditure was really necessary (o). It must also be pointed out, that although such expenditure has been allowed without the authority of the court, in order to avoid forfeiture of a lease, it has, so far, never been decided whether the same rule would be applied to prevent physical deterioration of the estate, ex. gr., to prevent the collapse of a house or other building (p).

10. Renewal of renewable leases.-By sect. 19 of the Trustee Act, 1893, a trustee of renewable

(n) Art. 65, infra.

<sup>(</sup>m) Re Hotchkys, Freke v. Calmady, supra.

<sup>(</sup>o) See per Kekewich, J., Conway v. Fenton, 40 C. D. at p. 518; and per Kay, J., in Re Jackson, Jackson v. Talbot, 21 C. D. at p. 789.

<sup>(</sup>p) It would seem, however, that the court could and would authorise such expenditure if applied to, notwithstanding Hibbert v. Cooke and Dent v. Dent, supra, there being no longer any duty on a tenant for life to repair out of his own pocket. With regard to the repair of infants' estates, the reader is referred to the classification made by Mr. Kenyon Parker, set forth in 21 C. D. at p. 787.

leases may, if he thinks fit, and must if required by any beneficiary so to do, use his best endeavours to obtain a renewal; and for that purpose is empowered to surrender existing leases. But where the beneficiary in possession is entitled, under the settlement, without any obligation to renew or to contribute to the renewal, then the Act does not apply unless he gives his consent. The 2nd sub-section provides that, "If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose." This section applies to trusts created before, as well as after, the Act, but is of course subject to the directions of the settlement. has been recently held by Kekewich, J., that its object was merely to assist trustees in renewing leases, and in no way affects the ultimate incidence of the expense as between tenant for life and remaindermen (q).

<sup>(</sup>q) Re Baring, Jeune v. Baring, (1893) 1 Ch. 61.

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- 11. Fencing of unfenced land.—Where the question arises as to the incidence of the cost, not of mere repairs, but of putting property into a better condition than it was originally in, it would seem that no part of the cost falls on income. Thus, the expense of fencing waste lands granted to a trustee for the benefit of the estate, must be paid out of corpus exclusively (r).
- 12. General costs incident to administration.— Legal expenses incident to the administration of a trust almost exclusively fall on capital, unless the settlor has expressly provided for them; for they are for the benefit of all persons interested. Thus, the costs of the appointment of new trustees (s), the costs incident to the investment or change of investment of trust funds (t), the costs of obtaining legal advice (u), and of taking the direction of the court (w), the costs of an administration action (x), the costs of paying money into court under the Trustee Relief Act (y), the costs of bringing or defending actions against third parties for the protection of the estate (z), and the like, are all payable out of

(r) Earl Cowley v. Wellesley, 1 Eq. 656.

<sup>(</sup>s) Re Fellows, 2 Jur., N. S. 62; Re Fulham, 15 ib. 69; Ex parte Davies, 16 ib. 882.

<sup>(</sup>t) But secus, of petition to vary investment of funds in court, see Equitable Society v. Fuller, J. & H. 379.

<sup>(</sup>u) Poole v. Pass, 1 B. 600.

<sup>(</sup>w) Re Elmore, 9 W. R. 66; Re Leslie, 2 C. D. 185.

<sup>(</sup>x) Re Turnley, 1 Ch. App. 152.

<sup>(</sup>y) Re Whitton, 8 Eq. 353. (z) See Stott v. Milne, 25 C. D. 710; and see also Re Earl De la Warr's Estate, 16 C. D. 587, and Re Earl of Berkeley's Will, 10 Ch. App. 56. And as to defending

corpus. On the other hand, where money is paid into court under the Trustee Relief Act, the costs of all necessary parties to a petition for obtaining an order for the payment of the income to the tenant for life have been held to be payable out of income (a). But where a testator gave a fund to trustees upon trust for investment in land, which was to be settled to the use of several persons successively for their lives, and the fund was paid into court in an administration suit, it was held, by Malins, V.-C., that the costs of a petition by a tenant for life for payment of the dividends to him, were payable out of corpus (b). As the V.-C. said:-"If the fund had been invested in land, the tenant for life would simply have entered into possession without incurring the expense of a petition, and I do not see why he should be in a worse position because the fund is in court. The fund remains here for the advantage of all persons interested, and it seems to me that all should bear the costs of this petition."

foreclosure actions and obtaining transferees of the mort-

gage, see More v. More, 37 W. R. 414.

(a) Re Marner, 3 Eq. 432; Re Evans, 7 Ch. App. 609; Re Whitton, 8 Eq. 352; Re Smith, 9 Eq. 374. The costs of a petition for advice as to the application of income have been ordered to be borne by income: Anon., 8 W. R. 333; 2 L. T. 71; Re T.—, 15 C. D. 78. But secus, as to costs of petition in an administration suit for payment of income to tenant for life, which are payable out of corpus: Longuet v. Hockley, 22 L. T. 198; Scrivener v. Smith, 8 Eq. 310; but see Eady v. Watson, 12 W. R. 682, contra.

(b) Scrivener v. Smith, supra.

ART. 40.—Duty of Trustee to exercise reasonable Care.

- (1) Trustees are not insurers (c), and except where courts of equity have imposed distinct and stringent duties upon them (which duties are mentioned in the succeeding articles of this chapter), they are only bound to use such due diligence and care in the management of the estate, as men of ordinary prudence and vigilance would use in the management of their own affairs (d).
- (2) The mere fact that a trustee who has committed a breach of trust, acted under the advice of his counsel or solicitor will not excuse him (e). But, nevertheless, if the alleged breach is founded on mere negligence in management, and not on the breach of some distinct duty, the fact that the trustee took the advice of qualified

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(e) Doyle v. Blake, 2 Sch. & L. 243; Re Knight, 27 B. 49.

<sup>(</sup>c) Re Hurst, Addison v. Topp, 67 L. T. 99.

<sup>(</sup>d) Brice v. Stokes, 2 Lead. Cas. 865; Mussey v. Banner, 1 J. & W. 247; Bullock v. Bullock, 56 L. J. Ch. 221; Speight v. Gaunt, 9 App. Cas. 1.

persons on technical matters may be strong evidence of diligence (f).

(3) Where a trustee is remunerated for his services, that fact does not add to his liability (g).

Although the rule is well settled that a trustee discharges his duties if he manages the trust estate with those precautions which an ordinary prudent man of business would take in managing similar affairs of his own, it is a rule which is not easy of application. The difficulty arises from the fact, pointed out by Lord Blackburn in the leading case of Speight v. Gaunt (h), that "Judges and lawyers, who see brought before them the cases in which losses have been incurred, and do not see the infinitely more numerous cases in which expense and trouble and inconvenience are avoided, are apt to think men of business rash." Moreover, Lindley, L. J., has recently laid it down (at all events in regard to making investments) that in applying the rule, "care must be taken not to lose sight of the fact that the business of the trustee and the business which the ordinary prudent man is supposed to be conducting for himself

(h) Supra.

<sup>(</sup>f) See per Lord Watson, Whiteley v. Learoyd, 12 App. Cas. 734, and Stott v. Milne, 25 C. D. 710. This question will be found more fully discussed under Art. 43, where the cases are examined in which a trustee may depute his duties.

<sup>(</sup>g) Jobson v. Palmer, (1893) 1 Ch. 71.

is the business of investing money for the benefit of persons who are to enjoy it at some future time, and not for the sole benefit of the person entitled to the present income. The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. That is the kind of business the ordinary prudent man is supposed to be engaged in, and unless this is borne in mind, the standard of a trustee's duty will be fixed too low, lower than it has ever yet been fixed, and lower certainly than the House of Lords, or this court, endeavoured to fix it in Speight v. Gaunt."

The principal cases in which the care demanded of a trustee has been considered, are those arising out of the investment of trust funds: but, as the duties of a trustee in regard to investment are of extreme importance, they will be treated of separately in the next article; and, for present purposes, the illustrations to the article now under consideration will be restricted to cases which do not arise out of the careless investment of trust moneys.

ILLUST. 1.—Realization of debts.—It is the duty of a trustee to realize debts owing to the trust estate with all convenient speed (i). He should

<sup>(</sup>i) Buxton v. Buxton, 1 M. & C. 93.

not only press for payment, but, if they are not paid within a reasonable time, should enforce payment by means of legal proceedings (k). It has been said that the only excuse for not taking action to enforce payment of such debts is a well founded belief, on the trustee's part, that such action would be fruitless, and that the burden of proving the grounds of such belief is on the trustee (k). Whether, however, this broad dictum is consistent with sect. 21 of the Trustee Act, 1893 (which is merely a re-enactment of sect. 37 of the Conveyancing and Law of Property Act, 1881), is respectfully questioned. The late Sir Geo. Jessel, M.R., at all events thought that the probable effect of that enactment was to make the question entirely one of good faith and not one of well founded belief (l). However (k), where by a marriage settlement the lady's father covenanted with three trustees to pay them 10,000%. within five years after his death, and an annuity of 300l. in the meantime, and the trustees (two of whom were the settlor's executors and residuary legatees) omitted to see that the money was paid and invested, but allowed it to remain in the testator's business for over ten years, at the expiration of which the business was found to be insolvent, it was held, that the third and solvent trustee was liable to make good the loss. As the Lord Justice Lopes compendiously put it, "such a trustee, in

<sup>(</sup>k) Re Brogden, Billing v. Brogden, 38 C. D. 546.(l) Re Owens, 47 L. T. 61.

my opinion, is bound, at the expiration of a specified time, to demand payment of the trust moneys, and, if that demand is not complied with within a reasonable time, to take active measures to enforce its payment, and, if necessary, to institute legal proceedings. I know of nothing which would excuse the neglect of such action on the part of a trustee, unless it be a well founded belief that such action on his part would result in failure and be fruitless, the burden of proving such well founded belief lying on the trustee setting it up in his own exoneration. No consideration of delicacy, and no regard for the feelings of relatives or friends, will exonerate him from taking the course I have indicated. Applying these principles to the present case, I come to the conclusion that Mr. B. committed a breach of duty in not taking more active and strenuous measures than he did to obtain payment of the trust funds in question. Fearful of the disruption of family relations, he seems to have been naturally unwilling to incur the odium which would attach to that firm and determined course which he ought to have adopted. . . . I am reluctantly, therefore—I say reluctantly, because I believe that Mr. B. acted throughout in good faith and honesty—compelled to hold that Mr. B. must be held liable." Whether, however, the decision would have been the same if the debtors had not been two of the trustees seems questionable, having regard to the admitted good faith of the defendant and to sect. 21 of the Trustee Act, 1893, as to

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which the reader is referred to illustration 3, infra.

2. On the other hand, it has been held that a trustee is not bound to commence legal proceedings when, in the exercise of a reasonable discretion, he considers it inexpedient to do so. For instance, in a case where one beneficiary would have been ruined by the immediate realization of a debt due from him to the trust estate, and the other beneficiaries (his children) would have been seriously prejudiced, the House of Lords held, that the trustee exercised a reasonable discretion in refraining from suing the debtor and in allowing him time, and that the trustee was consequently discharged from liability for any consequent losses (m). A somewhat similar case (Re Hurst, Addison v. Topp(n)) recently came before the Court of Appeal. There a testator gave his sons successively the right of pre-emption of his mill, at a valuation, the purchase-money to be payable by half-yearly instalments, and to be secured by a mortgage. investment clause, in addition to various securities, authorized the trustees to lend any part of the trust estate on the security of the mill, in the event of either of the sons purchasing it. The eldest son exercised the right of pre-emption at 50,000%, payable by half-yearly instalments of 2,000l., and secured by a mortgage of the mill. The son subsequently sold the equity of redemption to a company, which eventually went into liquidation.

<sup>(</sup>m) Ward v. Ward, 2 H. L. C. 784. (n) 67 L. T. 96.

The instalments were not regularly paid, and loss ensued, for which it was sought to make the trustees responsible. It was, however, held, that the trustees had done the best they could in the embarrassing circumstances in which the testator himself had placed them; and that therefore they were not liable. The decision, however, rested on the fact that it appeared that if the trustees had sued the son nothing could have been got out of him, and that with regard to the company, owing to the depressed state of trade, the best chance of getting paid the 50,000%, or any considerable part of it, was, not to force a sale, but to preserve the mill and business, and give time to the company to pay. The company did in fact pay off 10,800% odd, and regularly paid the interest, and spent 7,000% on the mill. Moreover, to have foreclosed and taken possession would, on the evidence, have been disastrous, and have exposed the trustees to risks and losses which no trustees could be expected to face (o). It will be perceived, therefore, that this case is not in conflict with illustration 1, but is merely an instance of the principle therein admitted by Lopes, L. J., viz., that where the trustees can prove that legal

<sup>(</sup>o) See also Re Medland, Eland v. Medland, 41 C. D. 476, where Kekewich, J., held that when a security, proper at the date of investment, subsequently becomes deteriorated, so as to leave no safe margin, it is not necessarily the duty of the trustees to call the money in; but they have a discretion, which they must exercise as practical men, with a due regard to all the circumstances, including the position and solvency of the mortgagor. (See also Robinson v. Robinson, 1 D., M. & G. 252.)

proceedings would have been fruitless, they are exonerated. However, the practitioner must be warned, that he would incur the most serious responsibility if he were to advise a trustee to act in a similar manner. For the onus would distinctly lie on the trustee, to prove that the *facts were* as he believed them; and the difficulty of proving this (perhaps many years afterwards), is obvious. In all such cases, therefore, where a trustee is doubtful whether he should sue a debtor or not, the proper course is to issue an originating summons asking for the direction of the Court. By taking this course, the trustee is relieved from a heavy responsibility at a trifling cost to the trust estate (p).

3. Compounding debts.—Trustees might always release or compound debts due to the trust estate, where they bonâ fide and reasonably believed that that course was for the benefit of their beneficiaries (q). And now by sect. 21 of the Trustee Act, 1893 (which is merely a re-enactment of sect. 37 of the Conveyancing and Law of Property Act, 1881), two or more trustees acting together, or a sole acting trustee, where a sole trustee is, by the settlement, authorized to execute the trusts and powers thereof, may (1) accept any composition; (2) accept any security, real or personal, for any debt or for any property, real or personal, claimed; (3) allow time for payment of any debt; (4) compromise, compound, abandon, submit to

<sup>(</sup>p) Re Brogden, Billing v. Brogden, 38 C. D., at p. 556.
(q) Blue v. Marshall, 3 P. W. 381; Forshaw v. Higginson, 8 D., M. & G. 827.

arbitration, or otherwise settle, any account, claim, on things whatever relating to the trust; and (5) enter into and execute all such agreements, releases, &c. as they or he may deem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good fuith. The exact effect of this enactment has so far not been judicially decided; but the late Sir George Jessel intimated that "it might have a revolutionary effect on this branch of the law. It looks as if the only question left would be whether the [trustees] have acted in good faith or not" (r). It is somewhat curious that this statutory authority was not referred to, either by counsel or the Court, in Re Brogden (supra), but it is apprehended that it was rightly assumed, that it could not apply to that case; because two of the trustees were the debtors, and must have known their own pecuniary position, and therefore could not have acted in good faith in the matter, and, as to the third trustee, having regard to the fact of his cotrustees being the debtors, he was practically a sole trustee in the matter, and yet was not a sole trustee who was by the settlement authorized to execute the trusts and powers thereof. Anyhow, until the 21st section of the Trustee Act is judicially interpreted, trustees would, in most cases, be ill-advised to act upon it without judicial sanction in view of the decision in Re Brogden.

4. Allowing rents to fall in arrear. — Where trustees allowed rents to get in arrear which they

<sup>(</sup>r) Re Owens, 47 L. T. 61.

might have recovered by proper diligence, it was held that they were liable to make good the arrears, though without interest, the judge saying: "If there be *crassa negligentia* and a loss sustained by the estate, it falls upon the trustee" (s).

- 5. Bankrupt trustee indebted to trust should prove.—Where a trustee, indebted to the trust, becomes bankrupt, it is his duty to prove the debt, and if he neglect to do so he will be liable for the loss, notwithstanding that he may have obtained his certificate. For, as was observed by Sir J. Romilly, M. R.: "Suppose a person owing money to a trust estate becomes bankrupt, and the trustee is a distinct and separate person knowing of the bankruptcy, he is bound to prove the debt; if he does not be commits a breach of trust, and would be held liable for all that he might have received under the commission if he had proved the debt as he ought to have done. Is the case altered because the trustee is himself the debtor? I think not; the original debt, no doubt, is barred, but the amount of the dividends which the trustee might have received under the commission is a liability subsequently attaching to the trustee in that character, and is not affected by the bankruptcy or the certificate (t).
- 6. Enforcing covenant against settlor.—So, again, where a settlor has, for valuable consideration,

<sup>(</sup>s) Tebbs v. Carpenter, 1 Mad. 291; and see as to interest, Lawson v. Copeland, supra; Wiles v. Gresham, 2 Dr. 258; Rowley v. Adams, 2 H. L. C. 725.
(t) Orrett v. Corser, 21 B. 52.

covenanted to settle property, a trustee who neglects to enforce the covenant is liable for any loss occasioned thereby (u). In order to obviate this very unpleasant and thankless duty, it is usual to insert a proviso in such settlements excusing the trustees from being liable for not enforcing such covenants.

7. Neglect to register in register county.—Or, again, if a trustee neglect to register the trust instrument (where it requires to be registered), and the settlor is thereby enabled to effect a mortgage on the property, the trustee will be liable (v).

8. Joining in sale of contiguous properties.—In the exercise of due diligence, trustees for sale will, of course, use their best endeavours to sell to the best advantage. They should, therefore (in general), abstain from joining with the owners of contiguous property in a sale of the whole together, unless, indeed, such a course would be clearly beneficial to their beneficiaries. For by doing so, they expose the trust property to deterioration on account of the flaws, or possible flaws, in the title to the other property. But "suppose there were a house belonging to trustees, and a garden and fore-court belonging to somebody else, it must be obvious that those two properties would

(u) Woodhouse v. Woodhouse, 8 Eq. 514; and Re Brog-

den, Billing v. Brogden, supra.

<sup>(</sup>v) Macnamara v. Carey, 1 Ir. R., Eq. 9; and as to neglect to give notice to an assurance company of an assignment to the trustees of a policy, see Kingdon v. Castleman, 25 W. R. 345.

fetch more if sold together than if sold separately; you might have a divided portion of a house belonging to trustees, and another divided portion belonging to somebody else. It would be equally obvious if these two portions were sold together, that a more beneficial result would thereby take place. . . . But in those cases where it is not manifest on a mere inspection of the properties that it is more beneficial to sell them together, then you ought to have reasonable evidence that it is a prudent and right thing to do; and that evidence, as we know by experience, is obtained from surveyors and other persons who are competent judges "(x).

- 9. "Where trustees for sale are joint owners with a third party, or are reversioners, it is obvious that they may in general join in a sale; for everybody knows that as a general rule (of course there are exceptions to every rule) the entirety of a freehold estate fetches more than the sum total of the undivided parts or the separate value of the particular estate and reversion" (y). And indeed this view has now received the express sanction of the legislature (z).
- 10. Depreciatory conditions of sale.—Again, trustees for sale ought not to do any act which will depreciate the property, and so they ought not unnecessarily to limit the title. For no reason-

<sup>(</sup>x) Per Jessel, M.R., Re Cooper and Allen's Contract, 4 C. D. 817.

<sup>(</sup>y) Ibid. (z) Trustee Act, 1893, sect. 13.

able man would unnecessarily depreciate his own property by such means. The subject of depreciatory conditions was formerly of great importance, because a purchaser might have objected to complete, on the ground that such conditions constituted a breach of trust for which he himself. taking with notice, might be held responsible (a). However, since 1888, the state of the law with regard to such conditions has been altered, and, now, no sale made by a trustee can be impeached at all, unless the beneficiaries prove that the consideration was thereby rendered inadequate; and, after the execution of the conveyance, no such sale can be impeached as against the purchaser, unless the beneficiaries also prove that such purchaser was acting in collusion with the trustee at the time when the contract for sale was made. Moreover, no purchaser can any longer make any requisition or objection on any such ground; and a trustee who is either a vendor or purchaser is not bound to exclude the application of sect. 2 of the Vendor and Purchaser Act, 1874 (b). The meaning of this enactment is not, however, so clear as could be desired. Is it intended exclusively to protect purchasers, and to free them from the necessity of taking the objection? or is it also intended to protect the trustee in the event of the beneficiaries suing the trustee for breach of trust? The words

(b) Trustee Act, 1893, sects. 14 and 15.

<sup>(</sup>a) Dance v. Goldingham, 8 Ch. App. 902; Dunn v. Flood, 25 C. D. 629; and on appeal, 28 ib. 586.

"no sale shall be impeached," are certainly more apt for expressing the first of such purposes than the second. Yet it is conceived that the trustee would receive the benefit of the doubt if the case should ever arise, and that henceforth the onus of proving loss in such transactions will fall upon the beneficiaries.

11. Improvident sale.—Again, if trustees for sale, or those who act under their authority, fail in reasonable diligence in inviting competition, or if they contract to sell under circumstances of great improvidence or waste, they will be personally responsible (c). It is, therefore, the duty of trustees for sale to inform themselves of the real value of the property, and for that purpose to employ, if necessary, some experienced person to value it (d).

12. Improvident purchase.—The same principle holds good in the case of trustees for purchase, who ought to clearly satisfy themselves of the value of the property, and for that purpose to employ a valuer of their own, and not trust to the valuer of the vendor. For a man may bonâ fide form his opinion, but he looks at the case in a totally different way when he knows on whose behalf he is acting; and if the trustees rely upon the vendor's valuer, and he, however bonâ fide,

<sup>(</sup>c) Ord v. Noel, 5 Mad. 440; and Anon., 6 Mad. 11;

Pechel v. Fowler, 2 Anst. 550.
(d) Oliver v. Court, 8 Pr. 165; Campbell v. Walker, 5 V. 680; and see per Jessel, M.R., Re Cooper and Allen, 4 C. D. 816.

values the property at more than its true value, they will be liable (e).

- 13. Trustees for purchase should also take reasonable care that they get a good marketable title, and that they do not, by conditions of sale, bind themselves not to require one (f); and they should never purchase without getting the legal estate (g).
- 14. Error of judgment.—A trustee is not responsible for a mere error of judgment, if he has exercised a reasonable discretion, and has acted with diligence and good faith. Thus, where an executor omitted to sell some foreign bonds for a year after the testator's death, although there was a direction in the will to convert with all reasonable speed, he was held irresponsible for a loss caused by the bonds falling in price; for although the conclusion he came to was unfortunate, yet, having exercised a bonâ fide discretion, the mere fact of the loss was not sufficient to charge him (h). As to what constitutes a reasonable delay, that depends on the particular circumstances affecting each case, but, primâ facie, a trustee ought not to delay

v. Wright, 14 B. 308; Lockhart v. Reilly, 1 D. & J. 464; and infra, art. 41.

(h) Buxton v. Buxton, supra; and see Paddon v. Richardson, 7 D., M. & G. 563.

<sup>(</sup>e) Ingle v. Partridge, 34 B. 412; and see also Fry v. Tapson, 28 C. D. 268; Waring v. Waring, 3 Ir. Ch. Rep. 331.

<sup>(</sup>f) E. C. R. Co. v. Hawkes, 5 H. L. C. 331.
(g) Lew. 440. And as to advancing trust money on a covenant to surrender copyholds, see Wyatt v. Sharratt, 3 B. 498; and as to equitable mortgages generally, Norris Wight 14 B. 308. Leylbout v. Polly, 1 D. S. I 464.

realization beyond a year, even where he has apparently unlimited discretion (i); and if he procrastinates beyond that period, the onus will be cast upon him of proving that the delay was reasonable and proper (j).

15. Theft of trust property.—A trustee will not be liable if the trust property be stolen, provided he has taken reasonable care of it (k), even although the thief be his own servant, if, on the facts proved, it appeared that the trustee was justified in deputing the custody of the property to such servant (ex. gr., the manager of a trust business (l)); yet, by a curious anomaly, he is liable if he is induced by fraud or forgery to hand it over to the wrong person (m). It is difficult to understand how this latter rule could have come into being, except upon the false analogy of a trustee to a banker or creditor. As has been shown in this article, a trustee is in the position of a gratuitous bailee; he must take reasonable care of the trust property, and if it is lost or stolen he is discharged from responsibility, provided that he was guiltless of

<sup>(</sup>i) Sculthorpe v. Tipper, 13 Eq. 232; and as to the propriety of an executor allowing the testator's money invested on mortgage to remain so until wanted, see Orr v. Newton, 2 Cox, 276; Robinson v. Robinson, 1 D., M. & G. 247.

<sup>(</sup>j) See per Wood, L.J., in Graybourne v. Clarkson, 3 Ch. App. 606, and Hughes v. Empson, 22 B. 181.

<sup>(</sup>k) Jones v. Lewis, 2 V. 240; Job v. Job, 6 C. D. 563. (l) Jobson v. Palmer, (1893) 1 Ch. 71; and see also Weir v. Bell, 3 Ex. D. 238.

<sup>(</sup>m) See Art. 42, and illustrations thereto, infra.

negligence. If, then, a careful trustee is not responsible for property stolen from his custody, upon what conceivable ground should he be held responsible for property obtained from him by false pretences or forgery, which are crimes far more subtle, and against which it is much more difficult to safeguard himself? It is humbly suggested, therefore, that in these instances the law might be re-considered by the legislature with advantage.

16. Neglect in keeping trust securities.—Where a trustee of a policy of insurance neglected to indorse on it a memorandum of the trust, or to give notice to the office, and subsequently carelessly allowed it to get into the settlor's hands, who mortgaged it to a third party, the trustee was held liable (n).

17. Neglect to invest trust fund.—A trustee ought to invest moneys in his hands subject to the trust within a reasonable time; and if he omits to do so, he will be charged interest (o); and, if the fund be lost, he will be liable to make it good (p). A fortiori will he be liable where he has left the trust fund in the sole custody of his co-trustee (q).

<sup>(</sup>n) Kingdon v. Castleman, 25 W. R. 345; and see Barnes v. Addy, 9 Ch. App. 244, and Hobday v. Peters, 28 B. 603.

<sup>(</sup>o) See Gilroy v. Stephen, 30 W. R. 755; Stafford v. Fiddon, 23 B. 386; and Jones v. Searle, 49 L. T. 91. In Cann v. Cann, 51 L. T. 770, Kay, J., considered that six months was the maximum period.

 <sup>(</sup>p) Moyle v. Moyle, 2 R. & M. 710.
 (q) Lewis v. Nobbs, 8 C. D. 591.

And, on similar grounds, trustees ought to accumulate infants' property by way of compound interest (r).

18. Not bound to insure.—A trustee is not bound to insure leasehold premises against loss by fire. In Bailey v. Gould (s), it was sought to charge an executor who had neglected to continue an insurance; but Baron Alderson said: "It (the insurance) was no claim existing at the time of the testator's decease. What then existed the executors did possess, that is, the leasehold premises. Being in their possession, a fire, for which they were not to blame, occurred. It was a mere misfortune which took place. Can the loss be said to have happened by their default in not keeping up a contingent claim?" Moreover, it was for many years considered doubtful whether trustees could lawfully insure trust property; but by sect. 18 of the Trustee Act, 1893, they are expressly authorized to do so to an amount not exceeding three-fourths of the value of the property insured, and to pay the premiums out of the income of that property or of any other property subject to the same trusts. The section does not, however, apply to property held on simple trust for beneficiaries absolutely, and is, of course, subject to the express directions (if any) of the settlement.

19. How far bound to see to repairs.—Trustees

<sup>(</sup>r) Conveyancing and Law of Property Act, 1881, sect. 43.
(s) 4 Y. & C. Ex. 221; and Dobson v. Land. 8 Ha. 216.

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are generally bound to see that trust premises do not fall into decay (t). But, as we have seen, the cost of repairs is not thrown exclusively on income (u), and trustees should apply to the Court for directions as to raising the necessary money (t). It has, however, been held that when leasehold houses are held in trust to receive the rents and pay them to A. for life, and after his death in trust for B., the trustees, in order to avoid forfeiture, are entitled to apply the rents in keeping the houses in a proper state (x). But this is without prejudice to the ultimate incidence of the costs (y).

20. Mala fides.—Trustees being liable for gross negligence, are, à fortiori, liable where they combine reckless disregard of the interests of their cestuis que trusts with mala fides. Thus, where one trustee retires from the trust in order, as he thinks, to relieve himself from the responsibility of a wrongful act meditated by his co-trustee, he will be held as fully responsible as if he had been particeps criminis (z).

(u) Art. 39, supra.

(y) Re Courtier, Coles v. Courtier, supra, and Re Hotchkys, Freke v. Calmady, supra.

(z) Norton v. Pritchard, Reg. Lib. B. (1844), 771; Le Hunt v. Webster, 9 W. R. 918; Palairet v. Carew, 32 Beav. 567.

<sup>(</sup>t) Per Cotton, L.J., Re Hotchkys, Freke v. Calmady, 32 C. D. 408.

<sup>(</sup>x) Re Fowler, Fowler v. Odell, 16 C. D. 723. But see Re Courtier, Coles v. Courtier, 34 C. D. 136, and also Art. 75, infra.

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21. Quasi trustees.—Even a quasi trustee, such as a vendor before completion of the sale, is obliged to take due care of the property, and to see that it does not become unnecessarily depreciated by want of care (a).

## ART. 41.—Duty of Trustee in relation to the Investment of Trust Funds.

(1) A trustee can only lawfully invest trust funds upon securities authorized by the settlement or by statute (b); and not upon the latter if the settlement forbids such investment (c).

(2) Even with regard to securities so authorized, a trustee is not free from liability, if, having regard to all the circumstances, and to the rules laid down in Arts. 36 and 40, it be improper or imprudent to make such investment (d).

(3) In particular, in investing on mortgage, he should (unless expressly

<sup>(</sup>a) See Earl of Egmont v. Smith, 6 C. D. 475.

<sup>(</sup>b) As to what securities are authorized by statute, see infra, p. 330 et seq.

<sup>(</sup>c) Trustee Act, 1893, sect. 1.

<sup>(</sup>d) See per Cotton and Lopes, L.JJ., in Re Whiteley, Whiteley v. Learoyd, 33 C. D. 347; aff. 12 App. Cas. 727.

authorized by the settlement) accept only a first legal mortgage (e) of freehold or copyhold property, which is not of a wasting character (f); should never join in a contributory mortgage (q); and should always obtain a report as to the value of the property made by, and act upon the advice as to its propriety as a trust investment of, a person whom he reasonably believes to be an able practical surveyor or valuer, instructed and employed independently of the owner of the property; and should never advance more than two-thirds of the value stated in such report (h).

(4) A trustee (unless authorized by the settlement), must not apply for, or hold any certificate to bearer issued under the authority of—

α. The Indian Stock Certificate Act, 1863;

 <sup>(</sup>e) Norris v. Wright, 14 Bea. 308; Lockhart v. Reilly,
 1 De G. & J. 476; and Swaffield v. Nelson (1876),
 p. 255.

<sup>(</sup>f) Re Whiteley, Learoyd v. Whiteley, supra; Smethurst v. Hastings, 30 C. D. 490. As to copyholds, Wyatt v. Sharratt, 3 Bea. 498.

<sup>(</sup>g) Webb v. Jonas, 39 C. D. 660; Re Massingbird, Clark v. Trelawney, 63 L. T. 290.

<sup>(</sup>h) Trustee Act, 1893, sect. 8.

- β. The National Debt Act, 1870;
- y. The Local Loans Act, 1875; or
- δ. The Colonial Stock Act, 1877 (h).
- (5) Where there is power to invest, such power carries with it the power to vary investments from time to time (i).
- (6) Where part of a testator's residuary trust estate consists of securities on which the trustees are permitted to invest, they are not bound to convert and then to procure others of the same nature, unless, having regard to all the surrounding circumstances, it would be imprudent to retain them (j).

Modern extension of trust securities.—For many years the court would not (in the absence of express direction) recognize any form of security as proper for the investment of trust funds, except

<sup>(</sup>h) Trustee Act, 1893, sect. 7. Nothing in this section, however, is to impose on the Bank of England or of Ireland, or on any person authorized to issue any such certificate, any obligation to inquire whether a person applying for such certificate is or is not a trustee, or to subject them to any liability in the event of their granting such certificate to a trustee, or to invalidate any such certificate if granted.

<sup>(</sup>i) Re Clergy Orphan Corporation, 18 Eq. 280; and see also Re Dick, Lopes v. Hume-Dick, (1891) 1 Ch. 433; aff. (1892) App. Cas. 112.

<sup>(</sup>j) See Ames v. Parkinson, 7 Bea. 379, apparently not even a second mortgage, Robinson v. Robinson, 1 D. M. & G. 252.

British Government securities (k). During the last fifty years, however, public sentiment has caused Parliament, cautiously and gradually, to intervene; and now, trustees are allowed, apart from the directions of the settlor, a considerable choice of investments of a sound character. This action of the legislature is no doubt largely owing to the altered circumstances of the time. Half a century ago, government securities yielded a far larger interest than that now produced by railway debentures or sound mortgages, and the gradual shrinkage of interest on consols produced a real hardship on tenants for life, who were probably the persons whose interests were most dear to the settlor. The value of land, too, contemporaneously with the birth of the railway system, began to rise with great rapidity, so that most persons (wrongly, as it now appears) considered that in a small country with an increasing population, the price, and therefore the security afforded by a mortgage of land, would continually increase. Moreover, fifty years ago, railways were in their infancy, and their success problematical, and the security of their mortgages (now universally converted into debenture stocks) was considered to be scarcely an investment for other

<sup>(</sup>k) In spite of some dicta to the contrary, it was at least very doubtful whether, in the absence of express directions, trustees were entitled to invest on real securities prior to the Act 22 & 23 Vict. c. 35: Raby v. Ridehalgh, 7 De G., M. & G. 104.

than persons of a speculative disposition. All such views have, of course, long since disappeared, and the security of the debenture stocks of our great railway companies is considered by men business as but little inferior to that of the government itself. Still more recently, the greater corporate boroughs have obtained parliamentary sanction to borrow, for certain specified public purposes, on the security of their rates, laying by each year a proportion of the sum borrowed as a sinking fund. It is not surprising therefore, considering these facts, and the great growth of trust funds caused by the vast accumulation of wealth made in commerce since the discovery of Australia and the introduction of steam power, that parliament should have greatly enlarged the powers of trustees with regard to investment. Thus, in 1859 trustees were authorized (unless expressly forbidden by the settlement) to invest in real securities in any part of the United Kingdom, or on stock of the Banks of England or Ireland, or on East India Stock, provided that such investment was in other respects reasonable and proper (1). was held, however, that this act was not retrospective, and did not apply to existing settlements; and consequently, in the course of the next session, it was made retrospective (m); and by the same act, trustees were further empowered to invest in stocks in which cash under the control of the court

<sup>(</sup>l) 22 & 23 Vict. c. 35, s. 32. (m) 23 & 24 Vict. c. 38, s. 12.

might be invested (n). This act contained no exception of funds with regard to which trustees were forbidden to invest on other than specified securities (o).

By acts passed in 1865 and 1871, trustees with express power to invest in the shares, bonds, or securities of companies incorporated by act of parliament, were authorized to invest in mortgage debentures or debenture stock (p). In 1867 an act was passed extending the meaning of East Indian Stock to Indian Government Securities, and enacting that trustees might invest in any securities guaranteed by parliament (q). In 1871, trustees were authorized to invest in stock of the Metropolitan Board of Works (now the London County Council) (r); and in 1875, trustees, with certain express powers of investment, were authorized to invest in securities issued under the Local Loans Act, 1875(s); and, by divers Local Acts, obtained by municipal corporations, trustees who were by their settlements authorized to invest in railway debentures or debenture stocks, were further authorized to invest in the stock issued by such municipal corporations, at a price not exceeding the redemption price (t). Finally, by the Trust Investment

<sup>(</sup>n) 23 & 24 Vict. c. 38, s. 11.

<sup>(</sup>p) See 28 & 29 Vict. c. 78, s. 40; and 34 & 35 Vict. c. 27.

<sup>(</sup>q) 30 & 31 Vict. c. 132, ss. 1 & 2. (r) 34 & 35 Vict. c. 47, s. 13. (s) 38 & 39 Vict. c. 82, s. 27.

<sup>(</sup>t) Such investments were authorized with regard to the following corporation stocks by the following acts,

Act, 1889 (now repealed and re-enacted by the Trustee Act, 1893), the powers of trustees in relation to investment are greatly extended, as will be seen hereafter.

ILLUST.-1. Investments authorized by the settlement itself.—Although the range of trust investments has, as above stated, been greatly increased, the court still scrutinizes, with considerable jealousy, any direction to invest in securities not authorized by parliament; and the following examples will show how careful a trustee ought to be, before assuming that the language of his settlement really authorizes investments which it appears at first sight, and to the average uncritical reader, to do. Thus, where a settlor empowers his trustees to place out the trust fund at interest "at their discretion," it seems to be the better opinion, that the discretion of the trustees is limited to a discretion as to which of the several forms of security authorized by law they shall invest in, and does not

viz.:—Brighton, 49 & 50 Vict. c. 64, s. 44; Birmingham, Local Gov. Ord. 1880, art. 7; Croydon, 47 & 48 Vict. c. 141, s. 105; Cardiff, 47 & 48 Vict. c. 222, s. 127; Leicester, 47 & 48 Vict. c. 32, s. 63; Glasgow, 46 & 47 Vict. c. 106, s. 57; Southampton, 48 & 49 Vict. c. 170, s. 76; Sheffield, 46 & 47 Vict. c. 57, s. 44; Portsmouth, 46 & 47 Vict. c. 211, s. 74; Rotherham, 45 & 46 Vict. c. 237, s. 43; Wolverhampton, 45 & 46 Vict. c. 240, s. 42; Rochdale, 47 & 48 Vict. c. 123, s. 52; Southport, 48 & 49 Vict. c. 122, s. 107; Sunderland, 48 & 49 Vict. c. 183, s. 120; Worcester, 48 & 49 Vict. c. 164, s. 80; Newcastle, 45 & 46 Vict. c. 235, s. 42. On the following stocks there was no restriction as to trustees purchasing at or below the redemption price, viz.:—Bristol, 47 & 48 Vict. c. 255, s. 45; Hull, 44 & 45 Vict. c. 94, s. 10; Liverpool, 43 & 44 Vict. c. 207, s. 9; Swansea, 44 & 45 Vict. c. 107, s. 10; Nottingham, 43 & 44 Vict. c. 208, s. 10.

give them power to invest in securities not so authorized; such, for instance, as ordinary railway stock (u). And indeed the word "invest" seems to point to a loan and not to an employment in a trading speculation, as also does a direction to place out at interest (v) or on security (x).

- 2. So, again, where a testator directed the conversion of all his property, except money in the funds, and the investment of the proceeds in government securities in England, it was held that Greek stock guaranteed by the British government could not properly be said to come under the expression "the funds or government securities in England" (y).
- 3. So, again, where trustees are authorized to retain a settlor's shares in a particular company, they must not accept new shares on reconstruction of the company (z), nor, à fortiori, ought they to increase their holding in the company. They

<sup>(</sup>u) Bethell v. Abraham, 17 Eq. 24, per Jessel, M. R.; and see Re Brown, Brown v. Brown, 29 C. D. 889, where this principle seems to have been admitted, although under the circumstances the court would not say that the trustees were liable.

<sup>(</sup>v) Bethell v. Abraham, supra; and see Cock v. Good-fellow, 10 Mod. 489; Dickenson v. Player, C. P., Cooper's Cases, 1837-8, p. 178.

<sup>(</sup>x) Harris v. Harris, 29 B. 107; Murphy v. Doyle, 29 L. R. Ir. 333; Re Kavanagh, 27 ib. 495.

<sup>(</sup>y) Burnie v. Getting, 2 Coll. 324. This was of course before the passing of the statutes by which trustees are now authorized to invest in foreign securities guaranteed by the British Government.

<sup>(</sup>z) Bucknill v. Morris, 52 L. T. 462; and see also Blount v. O'Connor, 17 L. R. Ir. 620.

may, however, accept an allotment of bonus shares, but must promptly sell them (a).

4. On the other hand, in Cadett v. Earl (b), it was held that a direction to invest in foreign government securities authorized an investment in the securities of individual states of the United States of America, although they are not independent nations. And in recent cases it was held that a power to invest in the securities of any "public company" extended to the securities of companies incorporated under the Companies Acts, and was not restricted to companies incorporated by statute or royal charter (c); and that a company incorporated by charter under the provisions of a general Act of Parliament was a "company incorporated by statute" (d).

5. It need scarcely be pointed out that, in the absence of clear, express and imperative direction, trustees (even where they have a discretion) cannot, without breach of trust, lend trust fund on the security of a personal promise, or of personal property, however apparently trustworthy (e); and, as Lord Kenyon said in *Holmes* v. *Dring*, this "ought to be rung into the ears of every one who acts in the character of trustee" (f). It is

<sup>(</sup>a) Re Pugh, W. N. 1887, p. 143.

<sup>(</sup>b) 5 C. D. 710; and see also Arnould v. Grinstead, 21 W. R. 155.

<sup>(</sup>c) Re Sharp, Rickett v. Sharp, 45 C. D. 286.

<sup>(</sup>d) Elve v. Boyton, (1891) 1 Ch. 501. (e) Styles v. Gye, 1 M. & G. 423; Child v. Child, 20 Bea. 50; Mills v. Osborne, 7 Sim. 30.

<sup>(</sup>f) 2 Cox, 1; Pocock v. Beddington, 5 V. 794; Potts v.

true that in one case, Bacon, V.-C., held, that where trustees were authorized to invest on real or personal security, they might permit money to remain merely on the security of a personal promise or bond (g); but it is humbly submitted, that, however this might be if the expression "personal security" stood alone, its juxtaposition in this case with the alternative "real security" ought to have restricted its meaning to "the security of personal property," and that to enlarge it so as to cover the security of a personal promise was scarcely justified (h). And moreover, as the direction was not imperative, it is difficult to understand on what principle the Vice-Chancellor authorized such an investment. Anyhow it is quite clear that where trustees, authorized to invest on personal security, do so merely for the purpose of accommodating the borrower, and not bonâ fide for the benefit of their beneficiaries, they will be liable for any loss, notwithstanding the authority (i). But of course if the trustees are not merely authorized, but are imperatively directed to invest on certain forms of investment, they are bound to obey the direction, however much they may disapprove (j). And also where they are

(g) See Pickard v. Anderson, 13 Eq. 608, sed quære.

(h) See Re Johnson, W. N. 1886, p. 72.

Button, 11 Eq. 433; Bethell v. Abraham, 17 Eq. 24; Ryder v. Bickerston, 3 Sw. 81, n. (a).

<sup>(</sup>i) Langston v. Oliphant, G. Coop. 33; and see Stewart v. Sanderson, 10 Eq. 26; and Francis v. Francis, 5 D. M. & G. 108.

<sup>(</sup>j) Cadogan v. Essex (Lord), 2 Drew. 227; Beauclerk v. Ashburnham, 8 B. 322. And see now Re Wedderburn, 9 C. D. 112.

expressly authorized to allow money to remain on an unsatisfactory security for the purpose of conveniencing a purchaser, they are justified in doing so (k).

- 6. Again, a trustee must not, in the absence of express authority, invest on trade security; as, for instance, in the shares of a public company, which are in reality no security at all, but merely documents conferring a right to speculative profits (1). It was on this ground that, before the passing of the acts of parliament before referred to, trustees were not entitled to invest, even in stock of the banks of England or Ireland, or in the stock of the old East India Company (m).
- 7. Investments authorized by statute.—As above stated, the powers of trustees as to investment have been from time to time extended by statute. By the Trust Investment Act, 1889 (now repealed and re-enacted by the Trustee Act, 1893, ss. 1 to 6), these statutes are amended and consolidated; and, as these statutory powers of investment are of supreme importance to trustees and their advisers, no apology is needed for setting them out in full.
- 8. The sections of the Trustee Act, 1893, above referred to, are as follows:-
- 1. A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust

<sup>(</sup>k) Re Hurst, Addison v. Topp, 63 L. T. 665.
(l) Harris v. Harris, 29 B. 107; Cock v. Goodfellow, 10 Mod. 489.

<sup>(</sup>m) Howe v. Lord Dartmouth, 2 Lead. Cas. 262.

funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say:

- (a) In any of the parliamentary stocks or public funds or government securities of the United Kingdom:
- (b) On real or heritable securities in Great Britain or Ireland:
- (c) In the stock of the Bank of England or the Bank of Ireland:
- (d) In India three and a half per cent. stock and India three per cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India under the authority of act of parliament, and charged on the revenues of India:
- (e) In any securities the interest of which is for the time being guaranteed by Parliament (n):
- (f) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the receiver for the Metropolitan Police District:
- (g) In the debenture or rentcharge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special act of parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock (o):
- (h) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-sec-

(o) See note (o), p. 333.

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<sup>(</sup>n) This includes Canadian 4 per cent. stock (Pacific Railway), 36 & 37 Vict. c. 45.

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tion (g), either alone or jointly with any other railway company:

- (i) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India:
- (j) In the "B" annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorized by act of parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D. and annuities comprised in the register of annuitants Class C. of the East Indian Railway Company:
- (k) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:
- (1) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special act of parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock:
- (m) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council, under the authority of any act of parliament or provisional order:

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- (n) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by act of parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorized by law to be levied:
- (o) In any of the stocks, funds, or securities for the time being authorized for the investment of cash under the control or subject to the order of the High Court (o),

and may also from time to time vary any such investment(p).

<sup>(</sup>o) These at present (see R. S. C. Ord. XXII. r. 17) are rather more restricted than the statutory investments, except as to that specified in sub-sect. (g) of the act, with regard to which all that the court requires is that the railway company has paid a dividend (not necessarily of this part is 3 per cent.) on ordinary capital for ten years next before the date of investment. The "City Editor" of "The Times" has recently stated that "lawyers differ" as to the effect of this, some contending that, with regard to investments open to trustees, the rule of court is governed and restricted by the act. It is, however, conceived that this is an absurd contention. The act enumerates a series of investments that are to be permanently permissible, and then, by way of further extension, and certainly not by way of restriction, says that also all stocks, &c. shall be permissible on which the court may for the time being authorize its funds to be invested. At present the court permits its funds to be invested on the debenture stocks of railway companies which have paid any dividend for ten years past; and therefore it follows, that, at present, trustees may follow suit. It is difficult to understand how any lawyer could be of a contrary opinion, which would render sub-section (o) absolutely meaningless. (p) This applies even where the settlement contains no

- 2.—(1.) A trustee may under the powers of this act invest in any of the securities mentioned or referred to in section one of this act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.
- (2.) Provided that a trustee may not under the powers of this act purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (g), (i), (k), (l), and (m) of section one, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate (q).
- (3.) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this act.
- 3. Every power conferred by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds.
- 4. The preceding sections shall apply as well to trusts created before as to trusts created after the passing of this act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust.
  - 5.—(1.) A trustee having power to invest in real secu-

power to vary. Re Dick, Lopes v. Hume-Dick, (1899) 1 Ch. 423; aff. (1892) App. Cas. 112; and see Re Outhwaite, (1891) 3 Ch. 49. The court will not, as a rule, interfere with the discretion of trustees as to varying investments. (Lee v. Young, 2 Y. & C. C. 532.)

(q) This, of course, overrides the more stringent restric-

(q) This, of course, overrides the more stringent restrictions imposed on trustees by the local acts under which these stocks were formerly made conditional trustee

investments.

rities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

- (a) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and
- (b) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864.
- (2.) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the instrument authorizing the investment, invest in the debenture stock of a railway company or such other company as aforesaid.
- (3.) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorizing the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875.
- (4.) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorizing the investment, invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880.
- (5.) A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an act of parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865.
- · 6. A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase,

or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

- 9. The foregoing securities refer to ordinary trusts (r); but where the trust fund consists of capital money arising under the Settled Land Acts, 1882 to 1890, or is money which is liable to be laid out, under the trusts of a settlement, in the purchase of land (s), the trustee must invest it, according to the direction of the tenant for life, in some of the modes specified in sect. 21 of the Settled Land Act, 1882, or at the option of the tenant for life, on the securities in which money produced by the exercise of a power of sale in the settlement might be invested thereunder (t).
- 10. Trustees not necessarily protected by investing in authorized securities.—It is a mistake to suppose that a trustee is free from responsibility

<sup>(</sup>r) The Act does not apply to trust funds of a building society (Re National Permanent Building Society, 43 C. D. 431); but it does to trust funds held by a corporation in trust for a charity (Manchester Royal Infirmary v. Att.-Gen., 43 C. D. 420).

<sup>(</sup>s) Settled Land Act, 1882, s. 33; and Re Mackenzie's Trusts, 23 C. D. 750.

<sup>(</sup>t) Settled Land Act, 1882, ss. 22 and 33. It is apprehended that, notwithstanding the word "thereunder," trustees, for purposes of the Settled Land Act, would now be authorized to invest in any of the securities permitted by the Trustee Act, 1893.

if he invests trust funds in some of the securities authorized by the settlement or by statute. To invest in any other securities would, of itself, be a breach of trust: but, even with regard to those which are permissible, he must take such care as a reasonably cautious man would use, having regard, not only to the interests of those who are entitled to the income, but to the interests of those who will take in future. It is not like a man investing his own money, where his object may be a larger present income than he can get from a safer security; but trustees are bound to preserve the money for those entitled to the corpus in remainder, and they are bound to invest it in such a way as will produce a reasonable income for those enjoying the income for the present. And in doing so, they must use such caution as a reasonably prudent man would with reference to transactions in which he may be engaged of a similar nature (u). Not that this means that a different degree of care is required in regard to the conduct of the business of a trust, according to whether there are persons to take in the future, or whether the trust fund is held in trust for one beneficiary absolutely. The question, in either case, is the due care of the capital sum (v); and in either case, the trustee is not allowed the same discretion in investing the trust fund as if he were

<sup>(</sup>u) Per Cotton, L. J., Re Whiteley, Whiteley v. Learoyd, 33 C. D. at p. 350.

<sup>(</sup>v) Per Lord Halsbury, same case when before H. L., see 12 App. Cas. at p. 732.

a person, sui juris, dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself not only to the class of investments which are permitted by the settlement or by statute, but to avoid all investments of that class which are attended with hazard (w).

11. Illustrations of permissible securities which might be improper under certain circumstances. -Thus, if any of the securities mentioned in the Trustee Act, 1893, were to become very much depreciated, so as to render them a hazardous investment, the fact that they are made permissible as trust investments by that statute, would not, it is conceived, protect a trustee who should invest trust funds upon them. And, à fortiori, would this be the case if he were to make such an investment for the purpose of procuring a larger income for the tenant for life. At the same time it must be acknowledged, that, save with regard to investments on mortgage, the statutory power is so guarded, that it is difficult to foresee any case in which a trustee could be held liable for investing on any of the permitted securities. Formerly it was held, that where a non-British government stock was above par, and within a few years of redemption at par, it was not a proper investment for trust funds; because the effect of such an investment might be to benefit the tenant for life

<sup>(</sup>w) Per Lord Watson, same case, 12 App. Cas. at p. 733.

at the expense of those in remainder (x). However, the intention of parliament, as expressed in the new act, appears to be to fix a standard of prudence for such cases, viz., that a trustee should not pay more than a premium of 15 per cent. above the redemption price, and that the period of redemption should be at least fifteen years distant at the date of investment. This clause, no doubt, only refers to the investments in sub-sects. (g), (i), (k), (l), and (m) of sect. 1, but, à fortiori, a trustee who adapted the rule to the other permissible securities would be safe. It may also be mentioned here, that under special circumstances, a change of investment from one which is safe to one which, although permitted, is less safe for the purpose of affording a larger income to the life tenant may be proper enough if the trustee acts in good faith. For instance, where property is settled on a parent for life with remainder to his children, and it is very important that the parent should have an increased income for their better support and education (y). In such a case, an investment in a redeemable stock above par would not merely benefit the tenant for life, but the remainderman also. Generally it may (it is conceived) be safely laid down, that where trustees act in good faith, and not collusively for the

<sup>(</sup>x) See Cockburn v. Peile, 3 D. F. & J. 170; Ungless v. Tuff, 9 W. R. 727; Waite v. Littlewood, 41 L. J. Ch. 636.
(y) Cockburn v. Peile, supra, per Turner, L.J.; and see Montefiore v. Guedalla, W. N. 1868, p. 67; Re Ingram, 11 W. R. 980.

manifestly sole benefit of the tenant for life, they will not now be held liable for changing a first class security for one which is authorized by the act, and which pays a better interest (z).

- 12. Not always justified in investing on mortgage.—Nevertheless, trustees should not invest on mortgage where it is not reasonable, merely to accommodate one of their beneficiaries. Still less ought they to do so merely to accommodate an outsider. Thus they would never be justified in lending a sum of stock (and, à fortiori, they would not be justified in selling it and lending the proceeds) on mortgage of real estate bearing interest at the same rate as the stock itself. For no possible benefit could accrue to the beneficiaries; and on the other hand, the security of the government would be changed for the less reliable security of private property. Consequently, such a transaction would afford the strongest presumption of an intention to accommodate the mortgagor (a).
- 13. Precautions to be observed by trustees who invest on mortgage.—As above stated, trustees are not freed from responsibility because they invest on authorized securities; but more especially is this the case when they lend trust funds on the security of a mortgage. The very simplicity of the

<sup>(</sup>z) See per Turner, L.J., in *Cockburn* v. *Peile*, supra; and per Kekewich, J., in *Re Walker*, *Walker* v. *Walker*, 62 L. T. 449.

<sup>(</sup>a) Whitney v. Smith, 4 Ch. App. 521; and see also Re Walker, Walker v. Walker, 62 L. T. 449, where trustees were held liable for varying investments without any reasonable cause.

authority, empowering them to invest on "real securities," is apt to mislead, and gives no indication of the severity with which the court regards such loans by trustees. In the first place, in the absence of express authority, trustees who desire to invest on mortgage, are restricted to first legal mortgages of real property. The mortgage should be a first mortgage (b), because otherwise trustees might not have funds available to redeem a prior incumbrancer who might threaten to foreclose. It should be a legal mortgage (c), because the protection afforded by the legal estate prevents any prior incumbrancer, of whom the trustees may have no notice, getting priority over them; and if trustees do invest in a mere equitable mortgage (for instance, a mortgage by way of covenant to surrender copyholds (d)), and any loss accrues, they will, it is apprehended (although this has never been expressly decided), be liable to make it good (e). It would seem, however, that there is no objection to the security being a sub-mortgage, as the trustees get the legal estate and in effect the additional security of the covenant of the

<sup>(</sup>b) Norris v. Wright, 14 B. 308; and Lockhart v. Reilly, 1 De G. & J. 476; and see also Worman v. Worman, 43 C. D. 296, where it was held that trustees with power to purchase real estate, must not purchase an equity of redemption.

<sup>(</sup>c) Swaffield v. Nelson, W. N. 1876, p. 255.
(d) Lewin, 328.
(e) See Norris v. Wright, supra; Drosier v. Brereton, 15 B. 221; Lockhart v. Reilly, supra; Swaffield v. Nelson, supra.

original mortgagor (f). Unless the settlement expressly authorized a mortgage of leaseholds, trustees could formerly only properly advance trust funds on the security of freeholds or copyholds; because the statutes which empowered trustees to invest on mortgage, confined them to mortgages of real estate; and leaseholds, however long and however free from rent and covenants, were not real estate (g). However, as above stated (h), the 5th section of the Trustee Act, 1893, authorizes investment on mortgage of certain long leaseholds held at nominal rents.

In the second place, the mortgage must not be a contributory mortgage, that is, a mortgage where the trustees join with other persons in a joint loan; for, in that case, the trustees would be putting it out of their power to realize without the joinder of third parties. In other words, they would be intrusting the trust property to persons who were not trustees of it. A contributory mortgage is therefore primâ facie a breach of trust (i).

In the third place, they must take precautions not to advance too much money on the security offered. The law on this point was altered in

<sup>(</sup>f) Smethurst v. Hastings, 30 C. D. 490. (g) Leigh v. Leigh, 35 W. R. 121; Re Boyd, 14 C. D. 626; but see as to long terms at perpercorn rents, Re Chennell, Jones v. Chennell, 8 C. D. 492.

<sup>(</sup>h) Supra, p. 334.
(i) Webb v. Jonas, 39 C. D. 660; Re Massingbird, Clark v. Trelawney, 63 L. T. 290; see last-mentioned case, p. 256, supra.

favour of trustees by sect. 4 of the Trustee Act. 1888 (now repealed and re-enacted in the eighth section of the Trustee Act, 1893). Previously to the 24th December, 1888, the duty of a trustee who was proposing to advance money on mortgage was as follows:—He was bound (as he still is) to ascertain the real value of the property, and for that purpose to employ a valuer and solicitor (k) of his own, and not trust to the valuer of the mortgagor (l); and to instruct such valuer that the valuation was required for the purpose of considering the advisability of investing trust funds on the security of the property (m). For a man may bonâ fide form his opinion, and yet look at the case in a totally different way when he knows on whose behalf he is acting. Moreover, he was (as he still is) bound to exercise his own judgment in the selection of the valuer, and not leave it to his solicitor (n). In the next place, he was not entitled to advance more than two-thirds of the amount at which the property was valued (0) (and that is still the same); and if it was house property not more than one-half (p); and if it

<sup>(</sup>k) Waring v. Waring, 3 Ir. Ch. Rep. 331.

<sup>(</sup>l) Fry v. Tapson, 28 C. D. 268; Walcott v. Lyons, 54 L. T. 786; Waring v. Waring, 3 Ir. Ch. Rep. 331; Ingle v. Partridge, 34 B. 412.

<sup>(</sup>m) See per Kay, J., Re Olive, Olive v. Westerman, 34 C. D. 70.

<sup>(</sup>n) Fry v. Tapson, supra; and see on all the points, Re Somerset, Somerset v. Lord Poulett, 68 L. T. 613; varied by C. A., W. N. (1893), p. 160.
(o) Stickney v. Sewell, 1 M. & C. 8; Drosier v. Brereton,

<sup>15</sup> B. 221; Re Godfrey, Godfrey v. Faulkner, 23 C. D. 483.

<sup>(</sup>p) Budge v. Gummon, 7 Ch. App. 719; Stretton v. Ashmall, 3 Dr. 12; Smethurst v. Hastings, 30 C. D. 490;

were trade property, the value of which depended on the continued prosperity of the trade, it would have been hazardous to advance even so much as that (q): and if he did invest on the security of real property used for trade purposes, he was bound to altogether disregard the value of the trade (r). However, these proportions were not inflexibly observed; and if, when the advance was made, the property was approximately up to the standards above indicated, trustees were not held liable for subsequent deterioration (s).

By the eighth section of the Trustee Act, 1893, which applies to all mortgages made since the 24th December, 1888, the duty of a trustee under such circumstances is considerably lightened. By that section it is enacted, that—"(1) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer (t), instructed and em-

(t) The words "reasonably believed" do not refer to

Stickney v. Sewell, supra; Re Olive, Olive v. Westerman, 34 C. D. 70. As to cottage property, see Priest v. Uppleby, 42 C. D. 321.

<sup>(</sup>q) Stretton v. Ashmall, supra; Royds v. Royds, 14 B. 54; Walcott v. Lyons, 54 L. T. 786.

<sup>(</sup>r) Whiteley v. Learoyd, 12 App. Cas. 727.
(s) Re Godfrey, Godfrey v. Faulkner, supra; Re Olive, Olive v. Westerman, supra.

ployed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report."

It will be seen, therefore, that the act makes a very considerable alteration in the law, and it is apprehended that in future a trustee advancing trust money on mortgage will be safe if he observes the following particulars, viz.:—

- (1.) He must act on the valuation and report of a surveyor or valuer; not necessarily a local one;
- (2.) He must have reasonable grounds for believing the surveyor or valuer to be an able practical man. For this purpose it is apprehended that the trustee must still exercise his own judgment, and not trust blindly to the nomination of his solicitor without inquiry;
- (3.) The surveyor must not be the surveyor of the mortgagor in the matter;
- (4.) The surveyor must be instructed by the trustee to make the valuation for him; and it is apprehended that his instructions should state that the trustee requires a

the words "instructed and employed," Re Walker, Walker v. Walker, 62 L. T. 447; Re Somerset, Somerset v. Poulett, 68 ib. 613.

- valuation for the purpose of considering the advisability of investing trust funds on the security of the property;
- (5.) The surveyor must not merely value the property, but must advise the trustee that the property is a proper investment for the money proposed to be lent;
- (6.) The trustee must not lend more than twothirds of the surveyor's valuation, but he may lend that much, irrespective of the tenure of the property, or the purposes for which it is used.

It must, however, be borne in mind that the act merely says that if the above precautions are taken a trustee shall not be liable for breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property; and it may, therefore, be doubted whether a trustee would not still be liable for advancing the money on property of a speculative character (such as a manufactory) on the ground not that he advanced too large a sum, but that he ought not to have advanced trust money on such a security at all (u).

But in addition to getting a legal first mortgage of property of a proper value, the trustee was formerly bound to see that the mortgagor had a good legal title free from incumbrances (other than rent-charges created under the Drainage Acts or the Improvement of Land Act, 1864); and for this purpose it was his duty to employ a solicitor,

<sup>(</sup>u) Consider Re Walker, Walker v. Walker, 62 L. T. 447.

and if the solicitor so advised, to have the abstract perused by a conveyancing counsel. In Hopgood v. Parkin (v) the late Lord Romilly held, that trustees were liable if their solicitor made a mistake in the investigation of the title; but for reasons which will be stated hereafter in the course of the illustrations of Art. 43, it is apprehended that that decision cannot be supported; and, indeed, it has been expressly dissented from by Lindley, L. J., in Speight v. Gaunt (w). Here again, the burden has been, to some extent, litted from the shoulders of a trustee, by the eighth section of the Trustee Act, 1893 (re-enacting the fourth section of the repealed Act of 1888), by which it is enacted, that—

- "(2.) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.
- "(3.) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the court the title accepted be such as a person acting with prudence and caution would have accepted.

 <sup>(</sup>v) 11 Eq. 70.
 (w) 22 C. D. at p. 761; and see per Lord Halsbury, in Re Whiteley, Whiteley v. Learoyd, 12 App. Cas. 727.

"(4.) This section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this act, except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight."

Lastly, trustees should not enter into any arrangement with the mortgagor for the continuance of the loan for a period of years (x); for they would thereby fetter themselves in the event of it being desirable (by reason of depreciation of the land or otherwise) to realize.

Art. 42.—Duty of Trustee to see that he pays trust moneys to the right Persons.

(1). The whole responsibility of handing the trust property to the persons entitled falls upon the trustee; and if he hands it to the wrong person, either through mistake on his part (y), or in consequence of some fraud practised upon him, he will have to make the loss good, however careful

<sup>(</sup>x) Vicary v. Evans, 30 Bea. 376.(y) Re Hulkes, Powell v. Hulkes, 35 W. R. 194; as to fraud, see Cutler v. Boyd, 60 L. T. 859.

he may have been. In cases of doubt, therefore, the trustee should apply to the court for its direction (z).

(2). But if the person who is really entitled to trust property is not the beneficiary who appears on the face of the settlement (but some one who claims through him), and the trustees, having neither express nor constructive notice of such derivative title, pay upon the footing of the original title, they cannot be made to pay over again (a).

Illust.—1. Forged authority.—Thus, where a trustee makes a payment to one who produces a forged authority from the beneficiary, the trustee, and not the beneficiary, will have to bear the loss. For, as was said by Lord Northington (b), "a trustee, whether he be a private person or a body corporate, must see to the reality of the authority empowering him to dispose of the trust money; for if the transfer is made without the authority of the owner, the act is a nullity, and in consideration of law and equity the right remains as before."

<sup>(</sup>z) Talbot v. E. Radnor, 3 M. & K. 252; Mulin v. Blagrave, 25 B. 137; Ashby v. Blackwell, 2 Ed. 302; Eaves v. Hickson, 30 B. 136; Sporle v. Burnaby, 10 Jur., N. S. 1142.

<sup>(</sup>a) Cothay v. Sydenham, 2 Br. Ch. Ca. 391; Leslie v. Baillie, 2 Y. & C. Ch. 91.

<sup>(</sup>b) Ashby v. Blackwell, supra.

- 2. False certificate.—So, again, trustees who paid over the trust fund to wrong persons, upon the faith of a marriage certificate, which turned out to be a forgery, were made responsible for so much of the trust fund as could not be recovered from those who had wrongfully received it (c).
- 3 Mistake as to construction of settlement -A trustee who, by mistake, pays the capital to the tenant for life, instead of investing it and paying him the income only, will have to make good the loss to the estate; although he will, as will be seen hereafter, be entitled to be recouped out of the life estate (d). And similarly, trustees who have distributed a trust fund upon what turns out to be an erroneous, although bonâ fide, construction of the trust instrument, are liable to refund the property distributed, together with interest thereon at four per cent. Thus, where executors distributed a testator's residuary estate upon an erroneous assumption that it was divisible among five persons instead of six, it was held, that the overpaid legatees could not be made to refund, and that the executors must pay the sum necessary to make up to the unpaid legatees one-sixth of the residue (e).

Floyer, 1 Ch. App. 26, and Sutton v. Wilder, 12 Eq. 373.

(d) Barratt v. Wyatt, 30 B. 442; Davies v. Hodyson, 25
B. 177; Griffiths v. Porter, ibid. 236.

<sup>(</sup>c) Eaves v. Hickson, supra; and see also Bostock v.

<sup>(</sup>e) Hilliard v. Fulford, 4 C. D. 389; and see also Re Ward, 47 L. J., Ch. 781; and Powell v. Hulkes, 33 C. D. 552.

- 4. Formerly, a trustee who paid trust money to the attorney of a beneficiary, was liable, if it turned out that the power was revoked by death of the beneficiary or otherwise. However, by sect. 23 of the Trustee Act, 1893 (re-enacting 22 & 23 Vict. c. 35, sect. 26), it was enacted that "A trustee acting or paying money in good faith under or in pursuance of any power of attorney, shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead, or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying. Provided that nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee."
- 5. Not bound to know of derivative title.—On the other hand, in Leslie v. Baillie (f), a testator, who died, and whose will was proved in England, bequeathed a legacy to a married woman whose domicile, as well as that of her husband, was in Scotland. The husband died a few months after the testator. After his decease, the executors of the testator paid the legacy to the widow. It was proved that, according to the Scotch law, the

<sup>(</sup>f) 2 Y. & C. Ch. 91; and see also Re Cull, 20 Eq. 561.

payment should have been made to the husband's personal representatives. It was however held, that in the absence of proof that the executors of the settlor knew the Scotch law on the subject, the payment to the widow was a good payment.

- 6. So where a solicitor for A. receives, and according to A.'s directions disposes of, the proceeds of property, without notice that in reality A. has settled the property, he is not liable to the beneficiaries (q).
- 7. Effect of not searching for notices of incumbrances.—On the other hand, a new trustee is liable to make good moneys paid by him bonâ fide to a beneficiary if the papers relating to the trust comprise a notice of an incumbrance created by that beneficiary depriving him of the right to receive the money. For, if the trustee had acquainted himself, as he was bound to do, with the trust documents and papers, he would have found what the true state of the case was (h). Where, however, no amount of search would have disclosed the notice, the trustee would of course not be liable, as his liability entirely depends upon his shirking the duty of search, which the law casts upon him (h).

<sup>(</sup>g) Williams v. Williams, 17 C. D. 437.
(h) Hallows v. Lloyd, 39 C. D. 686. This is so even where the trustees have a discretion to pay the income to or for the benefit of the assignor, "his wife or children," if they do in fact pay it to the assignor (Hemming v. Neil, 62 L. T. 649).

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## Art. 43.—Duty of Trustee not to delegate his Duties or Powers.

- (1) A trustee may not delegate his duties or powers (or à fortiori, the receipt of trust moneys) either to a stranger (i) or to his co-trustee (k), save only—
  - $\alpha$ . Where the settlement authorizes such delegation (l).
  - β. Where he is morally obliged to do so from necessity, and is acting conformably to the common usage of mankind, and as prudently as if acting for himself (m), and the agent employed is employed in the ordinary scope of his particular business (n).
  - 7. Where the delegated act is merely

<sup>(</sup>i) Adams v. Clifton, 1 Russ. 297; Turner v. Corney, supra; Chambers v. Minchin, 7 V. 196; Wood v. Weightman, 13 Eq. 434; Re Bellamy and Met. Board, 24 C. D. 387.

<sup>(</sup>k) Langford v. Gascoigne, 11 V. 333; Clough v. Bond, 3 M. & C. 497; Cowel v. Gatcombe, 27 B. 568; Eaves v. Hickson, 30 B. 136; Re Flower and Met. Board, supra.

<sup>(1)</sup> Kilbee v. Sneyd, 2 Moll. 199; Doyle v. Blake, 2 Sch. & L. 245.

<sup>(</sup>m) Speight v. Gaunt, 9 App. Cas. 1; Ex parte Belchier, Amb. 219; Clough v. Bond, 3 M. & C. 497; Bennett v. Wyndham, 4 De G. & J. 257.

<sup>(</sup>n) Fry v. Tapson, 28 C. D. 268.

ministerial, and involves no personal discretion (o).

δ. Where the delegated act is the receipt of money under sect. 56 of the Conveyancing and Law of Property Act, 1881, and the delegate is a solicitor authorized with all the statutory formalities (p).

E. Where the delegated act is the receipt of money payable under a policy of assurance, and the delegate is a solicitor or banker authorized with all the formalities prescribed by sect. 17 of the Trustee Act, 1893(q).

(2) But even where a trustee may safely permit another to receive trust property, he will not be justified in allowing it to remain in such other person's custody for a longer period than the circumstances of the case require (r).

General principle.—This rule is founded on the

<sup>(</sup>o) Sug. Pow. 179; Farwell, Pow. 358, 360.

<sup>(</sup>p) Trustee Act, 1893, s. 17, sub-s. 1. (q) Ibid., sub-s. 2. (r) Brice v. Stokes, 2 Lead. Cas. 865; Gregory v. Gregory, 2 Y. & C. 313; Re Fryer, 3 K. & J. 317, and as to subclauses 3. and  $\varepsilon$ ., Trustee Act, 1893, s. 17, sub-s. 3.

maxim delegatus non potest delegare; for a trustee is merely an agent for others, and, being personally trusted by the settlor, cannot delegate to others the duties which were confided to his own It is therefore an invariable rule. discretion that, even in cases where a trustee may employ an agent, he must still exercise his own judgment on every question, and must not give the agent carte blanche to do what he may think fit (s). The general principle as to the impropriety of delegating fiduciary duties and powers has been modified, both by judicial decisions and by statute; but, although the Act 22 & 23 Vict. e. 35, s. 31 (now repealed and re-enacted by sect. 24 of the Trustee Act, 1893), enacted that "a trustee shall (without prejudice to the provisions of the instrument, if any, creating the trust) be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited"; yet, as was pointed out by Lord Selborne, in the leading case of Speight v. Gaunt (t), this statute does not authorize a trustee, at his own mere will and pleasure, to delegate the execution of the trust and the custody of the trust moneys

 <sup>(</sup>s) See Re Weall, Andrews v. Weall, 42 C. D. 674.
 (t) 9 App. Cas. 1.

to strangers in the absence of a moral necessity from the usage of mankind for the employment of such an agency. Indeed, the only effect of the section appears to be, to shift the onus of proof from the trustee to the beneficiaries; so that whereas formerly it lay upon a trustee whose conduct was impugned to prove that he had acted from necessity according to ordinary business usage, it now lies on the beneficiaries, who make a charge of breach of trust, to prove that the trustee did not act from necessity or conformably to the universal custom (u). The question was treated with great perspicuity by Mr. Justice Kekewich, in the case of Re Weall, Andrews v. Weall (x), where his Lordship said: "Consider for a moment the position of that special agent called a trustee as regards the position of sub-agents. He certainly has the right to appoint them, if and so far as the work of the trust reasonably requires. For instance, he may appoint a broker to make or realize investments, or a solicitor to do legal business; and the power of employment involves that of remuneration at the cost of the trust estate. The limit of the power of employment is, as pointed out in the well-known case of Speight v. Gaunt (y), reasonableness; and reasonableness must also, I think, be the limit of the power of remuneration. A trustee is bound to exercise

<sup>(</sup>u) See Re Brier, 26 C. D. 238.(x) 42 C. D. 674.(y) Supra.

discretion in the choice of his agents, but, so long as he selects persons properly qualified, he cannot be made responsible for their intelligence or their honesty. He does not in any sense guarantee the performance of their duties. It does not, however, follow that he can entrust his agents with any duties which they are willing to undertake, or pay them or agree to pay them any remuneration which they see fit to demand. The trustee must consider these matters for himself, and the court would be disposed to support any conclusion at which he arrives, however erroneous, provided it really is his conclusion—that is the outcome of such consideration as might reasonably be expected to be given to a like matter, by a man of ordinary prudence, guided by such rules and arguments as generally guide such a man in his own affairs."

It must also be pointed out that, although trustees must always exercise their own judgment, and not surrender it to agents, and, à fortiori, not to beneficiaries, yet they are not debarred from inquiring what are the wishes and opinions of any of the parties interested.

Thus in Fraser v. Murdoch (z) trustees who were empowered by a testatrix to continue to hold all or any of the shares and stocks owned by her at her death, "should they consider it advisable or expedient to do so," wrote to the life tenant asking her views as to whether she would like to

<sup>(</sup>z) 6 App. Cas. 855.

have some City of Glasgow Bank Stock retained, but added that they did not consider it a very eligible trust investment. She answered that she would; and accordingly they retained 2001. of the stock, which, by reason of the failure of the bank, was lost. In giving judgment, Lord Blackburn said: "I agree that trustees are to exercise their own discretion; but I think they may inquire as to what are the wishes and opinions of others, especially of those who are interested, before they finally determine what, in the exercise of their own discretion, they think expedient; and I think that, in this case, there is no evidence that the trustees did more than they properly might." And Lord Selborne said: - "The truster did not. indeed, direct them to take into consideration the wishes or the opinions of the life renters, but I think it was proper and reasonable for them to do so, as long as they did not unduly favour the life renters at the expense of their children. In this case, I find no indication of an improper purpose. . . . . It would be extremely dangerous to hold that trustees, having such a discretion to exercise, might not freely discuss with the beneficiaries the reasons for and against a particular decision, without running the risk of being held to act against their own judgment, if they should disregard, in the end, objections to which they had thought it right in the first instance to direct attention."

ILLUST.—1. Must not leave trust business entirely to co-trustee.—Thus a trustee for sale of ordinary property, who leaves the whole conduct

of the sale to his co-trustee, cannot shield himself from responsibility for the latter's negligence, by saying that he left the matter entirely in his hands (a). For the settlor has entrusted the trust property and its management to all the trustees, and the beneficiaries are entitled to the benefit of their collective wisdom and experience (b).

- 2. Should not associate a stranger in the management.—Conversely, a trustee must not associate with himself another person (who is not one of the trustees) in the management of the trust estate. For the settlor has trusted him, and not the other person, and by allowing the latter to have the joint control of the property, the trustee puts it out of his own power to deal with it promptly and effectually in case of necessity (c).
- 3. Choice of advisers.—So, again, where trust property has to be valued for the purposes of sale, or property offered to trustees as a security for trust money has to be valued, or trust money has to be invested—the trustees must themselves choose the valuer or broker, and must not delegate that duty to their solicitors. No doubt trustees can employ a solicitor for legal matters which the trustee is not competent to undertake, for that is necessary; but the choice of a broker or valuer

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<sup>(</sup>a) Oliver v. Court, 8 Pr. 166; Re Chertsey Market, 6 Pr. 285; Hardwicke v. Mynd, 1 Anst. 109.

<sup>(</sup>b) See Luke v. South Kensington Co., 11 C. D. 121.
(c) Salway v. Salway, 2 R. & M. 215; White v. Baugh,
3 Cl. & Fin. 44.

is not properly the business of solicitors, but is a matter on which a trustee should exercise his own judgment (d). Of course, it must be understood that this does not preclude a trustee from asking advice or information as to the character of a broker, valuer, or other necessary agent, or from asking his solicitors to submit the names of such. All that is meant is, that he must judge for himself on the facts reported to him to guide his choice, and must not delegate the duty of choosing the agent either to his solicitors or to anyone else.

4. Power to lease, sell, &c .- A power of leasing cannot be delegated, for in its exercise much judgment is required. The fitness and responsibility of the lessee, the adequacy of the rent, the length of the term to be granted, and the nature of the covenants, stipulations and conditions which the lease should contain, are all matters requiring knowledge and prudence (e). On similar grounds, a trustee cannot delegate (as, for instance, by power of attorney) the execution of a trust or power to sell property. For the settlor has placed confidence in his discretion as to price and conditions, and it is a breach of that confidence to pitch-fork the entire business on to another person, without retaining any control or authority over it (f). On the other hand, a trustee may appoint

<sup>(</sup>d) See per Kay, J., in Fry v. Tapson, 22 C. D. 727.
(e) Robson v. Flight, 4 D., J. & S. 614.

<sup>(</sup>f) Oliver v. Court, 8 Pr. 166; Hardwicke v. Mynd, 1 Anst. 109; Hawkins v. Kemp, 3 East, 410.

an attorney merely to pass the legal estate, as such an act involves no discretion (g). And where trustees had power to elect a clergyman, it was held that they could not appoint proxies to vote; but when the choice was once made, they could appoint proxies for the purpose of signing the formal presentation (h). However, the rule yields to necessity, and trustees may appoint an attorney to act for them in a foreign country, even in matters involving judgment and discretion (i).

5. Former inability of co-trustee to pass on discretionary powers to new trustees.-The rule as to the impossibility of delegating discretionary or confidential powers is so stringent, that formerly, where a settlement contained no power to appoint new trustees with similar powers to those conferred on the trustees appointed by the settlor, it was not even competent for the court to confer such powers upon new trustees, save only where the power was so interwoven with the trust itself, that there could be no execution of the trust without the exercise of the power, in which case the power must of necessity be exercised by the new trustees (k). Thus, where there were trustees for sale, with a power to give valid discharges for the purchasemoney, and it became necessary to appoint new trustees, the power was properly exerciseable by them; for without the power they could not sell the

<sup>(</sup>g) Farwell, Pow. 445.

<sup>(</sup>k) Lewin, 412.

property, and the settlor's intentions would have been frustrated. They therefore took the power of necessity (1). On the other hand, a power of sale (as distinguished from a trust for sale) could not, in the absence of express directions to that effect, be executed by a new trustee. However (save so far as questions of title in relation to past acts of trustees are concerned), the point will not arise in future; for, by the 27th section of Lord Cranworth's Act (m), it was enacted, that every trustee appointed by the court, either before or after the 28th August, 1860, should have the same powers, authorities and discretions, and should in all respects act as if he had been originally nominated a trustee by the trust instrument. And by the same section it was also enacted, that a new trustee of any instrument coming into operation after the 28th August, 1860 (appointed under the statutory power thereby conferred), should have the like powers. And now by the 10th section of the Trustee Act, 1893, the same powers are conferred on new trustees irrespective of the date of the trust instrument.

6. May employ agents where morally obliged to do so.—On the other hand, where the property is

<sup>(</sup>l) Ibid.; Drayson v. Pocock, 4 Sim. 283; Byam v. Byam, 19 B. 58; Bartley v. Bartley, 3 Dr. 385; Lord v. Bunn, 2 Y. & C. 98.

<sup>(</sup>m) Re-enacted by section 38 of the Conveyancing Act, 1881. These enactments do not, apparently, apply where a power is confided to an executor virtute officii, see Re Mainwaring, Crawford v. Forshaw, (1891) 2 Ch. 261.

of a nature (such as stock or shares) which, morally speaking, a trustee cannot personally sell, or which it would be distinctly contrary to the ordinary usage of mankind for him to sell personally, he may employ an agent or broker, so long as he acts as prudently as he would have. done for himself in a like case (n). For "where an investment of trust moneys is proper to be made upon securities which are purchased and sold upon the public exchanges, either in town or country, the employment of a broker, for the purpose of purchasing those securities, and doing all things usually done by a broker which may be necessary for that purpose, is primâ facie legitimate and proper. A trustee is not bound himself to undertake the business (for which he may be very ill-qualified) of seeking to obtain them in some other way: as, for example, by public advertisement or by private inquiry" (o).

7. May employ skilled persons. - So trustees may appoint stewards, bailiffs, workmen and other agents of the like kind; for there is a moral necessity for them to do so (p). And on the same ground they may employ solicitors, valuers (q), auctioneers, and other skilled persons to do acts which they themselves are not competent to do.

(n) Ex parte Belchier, Amb. 219.

<sup>(</sup>o) Per Selborne, L.C., Speight v. Gaunt, 9 App. Cas. 1. (p) Re Whiteley, Whiteley v. Learoyd, 12 App. Cas. 727.
(q) With regard to valuers, a trustee is now expressly

authorized to act on a valuer's report and advice as to the value of property offered as a security for trust funds (Trustee Act, 1893, s. 8, see supra, p. 345).

They may employ an accountant where their accounts are of a complicated nature, and the occasion is one in which, according to the usage of business, a prudent man, acting for himself, would employ such a person (r). But of course trustees are not entitled to have their books of account of income and expenditure regularly kept by an accountant, merely in order to save themselves trouble. As Lord Halsbury said, in Re Whiteley, Whiteley v. Learoyd (s), "I think it is quite clear, that a trustee is entitled to rely upon skilled persons in matters in which he cannot be expected to be experienced. He may perhaps rely upon a lawver on some matters of law, and in this case I do not deny that he would be entitled to rely upon a valuer upon a pure question of valuation. But unless one examines with reference to what question the skilled person gives advice, it is possible to confuse the reliance which may be properly placed upon the skill of a skilled person with the judgment which the trustee himself is bound to form on the subject of the performance of his trust. I do not think it is true to say that one is entitled to consider the special qualities or degree of intelligence of the particular trustee. Persons who accept that office must be supposed to accept it with the responsibility at all events for the possession of ordinary care and prudence."

<sup>(</sup>r) See New v. Jones, 1 M. & G. 668, n.; Henderson v. M<sup>\*</sup> Vver, 3 Mad. 275.
(s) 12 App. Cas. 727, at p. 731.

8. Whether liable for negligence of solicitor .-Lord Halsbury's phrase, "he may, perhaps, rely upon a lawyer in some matters of law," referred, it is conceived, to the doubt thrown upon that proposition by the decision of the late Lord Romilly in Hopgood v. Parkin (t), where that learned judge carried the liability of trustees for the acts and defaults of their agents to a height which, it is with humility suggested, was by no means justified, either on principle or authority. In that case, trustees, having trust funds to lend on mortgage, employed a solicitor to investigate the mortgagor's title. Owing to the solicitor's negligence, in failing to make proper inquiries as to previous incumbrances, the trust moneys advanced on the mortgage were to a large extent lost, and his lordship held that the trustees must replace them. But it is difficult to understand upon what grounds the learned judge based his opinion. The trustees were right in investing on mortgage: they were right in employing a skilled person to investigate the real value of the security; indeed, it is apprehended, from the remarks of Sir George Jessel, M. R., in Re Cooper (u), that it was the duty of the trustees to employ a skilled person. In addition to which, there was a moral necessity for them to employ a skilled agent to investigate the title, and they were but acting conformably to the general "usage of mankind, and as prudently

<sup>(</sup>t) 11 Eq. 70. (u) 4 C. D. 815.

for the trust as for themselves, and according to the usage of business" (v). If, then, they were right in employing the solicitor to investigate the title for them, upon what possible ground could they be held responsible for their agent's default? As Lord Hardwicke said, in Ex parte Belchier (x), if the defendant "is chargeable in this case, no man in his senses would act. . . . . This court has laid down a rule with regard to the transactions of assignees, and more so of trustees. so as not to strike a terror into mankind acting for the benefit of others, and not for their own"; and his Lordship then proceeded to lay down the rule as above stated. It is with great respect submitted, that Lord Romilly confused the case with those in which it has been held that a trustee is responsible for a breach of trust which he has committed bonâ fide and under skilled advice. The distinction, is, however, clear. The trustees had not done anything wrong. They had not committed any breach of trust at the instance of another. They had merely lent money through the medium of an agency, which they were entitled, and indeed bound, to employ, on the ground of moral necessity, and they ought therefore to have been discharged from the loss. Had there been a distinct breach of some duty which the settlor had cast upon the trustees, then, although

 $(\hat{x})$  Supra.

\_\_(v) Per Lord Hardwicke, Ex parte Belchier, Amb. 219; and to the same effect Lord Selborne in Speight v. Gaunt, 9 App. Cas. 1.

they might have taken and followed the best advice procurable, they would, no doubt, have been properly held responsible; but here, the only possible breach of duty was the negligence of an agent, and, as has been said above, a trustee is only responsible for his agent where he has improperly employed one. Moreover, since the above was first written, Lord Justice Lindley, in Speight v. Gaunt (y), has expressly dissented from Hopgood v. Parkin, and, indeed, it seems to be quite inconsistent with the judgments of the learned Lords of Appeal in the former case.

9. In Re Bird (z), on the other hand, Vice-Chancellor Bacon seems (if I may say so, with great submission) to have gone to the opposite extreme. There, one of three executors employed the solicitor of the testatrix for the purpose of obtaining a settlement with a creditor of the testatrix. The solicitor subsequently informed the executor that the compromise had been effected, and requested a cheque for the amount, which the executor sent. No compromise had ever been made, and the solicitor appropriated the money to his own use. Here it might have been held liable, as, in accordance with Bostock v.

<sup>(</sup>y) 22 C. D. at p. 761; and see per Pearson, J., in Re Pearson, Oxley v. Scarth, 51 L. T. 672; Re Weall, 42 C. D. 674.

<sup>(</sup>z) 16 Eq. 203.

Floyer (a), he ought to have paid the money to the creditor personally and not to the solicitor; but the Vice-Chancellor decided that he was not liable, saying: "It seems to me that the executor has done just what any prudent man would think himself safe in doing. He finds that the testatrix had in her lifetime employed Mr. Hunt as her solicitor. He had been employed as her solicitor on various matters; his credit was not called in question, his ability was not doubted. He had arranged for her some other claims, and when, after her death, a claim is made by these two companies, naturally enough Mr. Hunt is employed to conduct the business, namely, the compromise of these claims. Having employed this attorney to negotiate for a compromise, and being told by him 'I have got these terms for you, and 3101. is payable,' the executor puts into his hands the 310%. What negligence is there in that? What incautious trusting to some other person's representation? It is all in the ordinary course of the business then being transacted, and I cannot think that the executor has neglected any caution which it was incumbent on him to exercise." It would seem, however, that this decision is directly in conflict with dicta of Lord Selborne in Speight v. Gaunt (b), and cannot be supported either on principle or by authority.

<sup>(</sup>a) 1 Eq. 29. (b) 9 App. Cas. at p. 11; and see also Re Bellamy and Met. Board, 24 C. D. 387.

10. Whether a trustee rightly employing an agent may trust him with trust money.—Even where a trustee is justified in delegating the sale or purchase of property to other persons (such as brokers, solicitors, and the like), it does not necessarily follow that he is justified in giving them the control of the purchase-money. That question must be regarded as a separate and distinct one, to be solved on its own merits, but by the applieation of the same principle, viz., whether or not there is a moral necessity or a conformity to common usage. Thus, where a trustee handed money to a solicitor for the purpose of re-investment, and the solicitor professed to have, but in reality had not, invested it, but had used it for his own purposes, and himself paid interest on it for some years until his death, it was held that the trustee was liable (c); for he ought not to have entrusted the money to a solicitor when there was no necessity. On similar grounds, it was formerly held, in Re Bellamy and Met. Board (d), that trustees were not entitled to authorize their solicitor to receive purchase-money payable to them, notwithstanding sect. 56 of the Conveyancing Act, 1881. However, by sect. 17 of the Trustee Act, 1893 (re-enacting sect. 2 of the Trustee Act, 1888), it is enacted as follows:-

"(1.) A trustee may appoint a solicitor to be his agent

<sup>(</sup>c) Bostock v. Floyer, 1 Eq. 29; Rowland v. Witherden,
3 M. & G. 568; Hanbury v. Kirkland, 3 Sim. 265; Dewar
v. Brooke, 33 W. R. 497. But see Re Bird, 16 Eq. 203.
(d) 24 C. D. 387.

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to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in sect. 56 of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee.

"(2.) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such

appointment.

"(3.) Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee.

"(4.) This section applies only where the money or valuable consideration or property is received after the 24th day of December, 1888.

"(5.) Nothing in this section shall authorize a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust."

The section is not, perhaps, so happily expressed

as it might be. For instance, can a trustee authorize his solicitor to receive consideration money, except by permitting him to have the custody of the deed, &c.? And where the receipt is indorsed on a deed, and not contained in the body thereof, can that deed be said to be "a deed containing any such receipt as is referred to in the 56th section of the Conveyancing and Law of Property Act, 18819"

The first of these queries is, it is submitted, by no means hypercritical, and in cases where any money or property is receivable by a trustee on any occasion where the execution of a deed by the trustee is not necessary (as, for example, the payment of a legacy by executors to the trustees of the legatee's marriage settlement), considerable doubt must exist as to whether the payment can be properly made to the trustee's solicitor under this sub-section, even although the solicitor be expressly authorized by the trustee to receive it. This view receives some support from the provisions contained in sub-sect. (2), which expressly authorize a trustee to appoint a solicitor his agent to receive policy moneys by permitting him to have the custody of and to produce the policy with a receipt signed by the trustee. For policy money would certainly fall within the first sub-section as "money receivable by such trustee"; and if, under subsect. (1), the trustee could appoint a solicitor in any other way than that indicated, there would have been no necessity for expressly authorizing (by sub-sect. 2) a trustee to appoint a solicitor to

be his agent to receive and give a discharge for policy moneys, and for declaring that no trustee shall be chargeable with a breach of trust by reason only of his having made or concurred in making an appointment of a solicitor for that purpose. Anyhow, the point does not appear to be free from doubt.

With regard to the second query, it is probable that the court would consider an indorsed receipt as equivalent to a receipt contained in the deed on which it is indorsed, within the meaning of the sub-section.

It will be perceived that sub-section (1) does not authorize a trustee to appoint anyone to receive money, valuable consideration, or property, except a solicitor. Consequently, the decision in Flower v. Metropolitan Board of Works (e), that one of several trustees cannot in general be authorized by his co-trustees to receive and give a good receipt for trust moneys, still holds good. It is apprehended, however, that where one of the trustees is a solicitor, the money may be paid to him on production of a deed containing a receipt, notwithstanding that he may not be acting as the solicitor to the trustees.

11. Apart from statutory authority, where there is a moral necessity to entrust the agent with the money, a trustee will be justified in doing so, as was decided by the House of Lords in the im-

<sup>(</sup>e) 27 C. D. 592.

portant case of Speight v. Gaunt (f). There, the respondent, Isaac Gaunt, being acting trustee under the will of John Speight, a stuff manufacturer at Bradford, wished to invest the sum of 15,2751., part of the trust estate, in the securities of municipal corporations in Yorkshire, and for that purpose he employed a young stockbroker, named Cooke, to buy the stock for him. Cooke having falsely represented that he had purchased the stock, the respondent gave him cheques for the amount, which Cooke embezzled. The beneficiaries then sought to make the trustee liable for the sum embezzled by Cooke. In giving judgment, exonerating the trustee from liability, the Earl of Selborne said:—"The principles of equity, with respect to the duties and responsibilities of trustees, and the distinction between those losses of trust funds for which they are, and those for which they are not, liable, are so well settled, and are of such great general importance, that the present case, in which two courts have differed as to their application, has naturally been considered by your lordships with some anxiety. In the early case of Ex parte Belchier, before Lord Hardwicke (g), it was determined, that trustees are not bound personally to transact such business connected with, or arising out of, the proper duties of their trust, as, according to the usual mode of conducting business of a like nature, persons acting with

<sup>(</sup>f) 9 App. Cas. 1. (g) Amb. 218.

reasonable care and prudence on their own account would ordinarily conduct through mercantile agents; and that when, according to the usual and regular course of such business, moneys, receivable or payable, ought to pass through the hands of such mercantile agents, that course may properly be followed by trustees, though the moneys are trust moneys; and that if, under such circumstances, and without any other misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss. That authority has ever since been followed; and, in conformity with it, the statute 22 & 23 Vict. c. 25, s. 31 (//), enacts that every instrument creating a trust shall be deemed to contain a clause exonerating the trustees from liability 'for any banker, broker, or other person with whom any trust moneys or securities may be deposited.' Neither the statute, however, nor the doctrine of Ex parte Belchier, authorizes a trustee to delegate at his own mere will and pleasure the execution of his trust, and the care and custody of the trust moneys to strangers, in any case in which (to use Lord Hardwicke's words) there is no 'moral necessity from the usage of mankind' for the employment of such an agency . . . . The first point requiring consideration is, whether

<sup>(</sup>h) Now repealed and re-enacted by sect. 24 of the Trustee Act, 1893. This section only seems to have the effect of shifting the onus of proof from the trustee to the beneficiary (Re Brier, B.v. Evison, 26 C. D. 238, see p. 356, supra).

the payment of the 15,275l. to Cooke on the 24th of February was a breach of trust. That depends upon two questions—(1) whether it was proper for the respondent, as a trustee, to use the agency of a broker for the purpose of the intended investment; and (2) whether, if so, the payment of the money to the broker so employed, under the circumstances of this ease, was justified upon the principle of Ex parte Belchier?" His Lordship then discussed the first question in the terms quoted in Illustration 6, and continued: "Thinking, therefore, that the employment of Cooke as a broker in this case, under the instructions actually given to him, was proper, and not inconsistent with the duty of the respondent as trustee, the next subject of inquiry is, whether it was a just and proper consequence of that employment, according to the principle of Ex parte Belchier, that the trust money should pass through his hands. Upon this point I must first observe that the case appears to me to be different from what it would have been if Cooke had entered into contracts with the several corporations for direct loans to them by the respondent, and had reported to the respondent that he had done so. agency of a broker, as such, is not required to enter into a contract of that kind; and if the agency of a person who happens to be a broker is, in fact, employed to do so, I do not perceive why the consequences should be different from what they would be if a solicitor or any other person had been employed. The transaction could

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not be governed by the rules or the usage of the London or any other exchange. There would be no moral necessity, or sufficient practical reason, from the usage of mankind or otherwise, for payment of the money to the agent; there would be no difficulty or impediment arising from the usual course of such business in the way of its passing direct from the lender to the borrower, in exchange for the securities; and if it should be found convenient to send it by the hand of a broker, or of any other messenger or agent, this might be done by a cheque made payable to the borrower or his order, and crossed, as is usual in direct dealings between vendor and purchaser, debtor and creditor, when payments of considerable amount have to be I think it right not to withhold the expression of my opinion that such a case would fall within the principle of Rowland v. Witherden and Floyer v. Bostock, rather than that of Ex parte Belchier. On this subject I find myself in agreement with Lord Justice Bowen; nor do I infer, from the judgments of Lord Justice Lindley and Sir George Jessel that either of them thought otherwise. If, however, the respondent-being justified (as I think he was) in the employment of Cooke in the way in which he employed himwas entitled to give credit to the representation made on the face of the bought note which he received from Cooke, and to act upon the faith of it, the rules and usages of the London Stock Exchange are material; and the payment to the broker, if made conformably to such rules and usage, was no breach of trust, and was not at the respondent's peril. The whole evidence satisfies me that the usual and regular course of business on the London Exchange is, for the money, under such circumstances, to pass through the broker's hands." Their lordships, therefore, exonerated the trustee from responsibility.

12. On similar principles (viz., conformity to ordinary business usage), a trustee may allow an auctioneer who is selling the trust property, to receive the deposit money; but he must not allow it to remain in the auctioneer's hands for an unreasonable time (i).

13. May entrust moneys to a banker pending investment.—So, again, a trustee may, and indeed should, deposit trust moneys in a respectable bank pending investment; and he will not be liable for the failure of the bank, unless he left the money there for an unnecessarily long period. For it is according to the common usage of mankind to make use of banks for the safe custody of money (k). But a trustee will be liable where he has unnecessarily left trust moneys in the hands of a banker who fails, when he ought to have invested them, or where he has paid money to a banker or broker for investment and has neglected for some time to make inquiries as to such invest-

<sup>(</sup>i) Edmonds v. Peake, 7 Bea. 239. (k) Johnson v. Newton, 11 Ha. 160; Fenwick v. Clarke, 31 L. J. Ch. 728, and per Lord Hardwicke, Ex parte Belchier, Amb. 219.

ment (1); and the usual clause indemnifying him against the acts or defaults of others will not protect him (m). In a comparatively recent case, Kay, J., held that six months was the maximum time for which trustees should deposit money in a bank; and that if at the expiration of that period no other investment was available, the trustees ought to invest in consols. In the case in question the trustees had kept the money on deposit for fourteen months, and were held responsible for the loss caused by the failure of the bank (n). On the same ground of conformity to universal usage, trustees may remit money through the medium of a respectable bank, as being the most convenient and the safest mode (o); but they should pay the money into the bank as trustees, and co nomine (p).

14. May employ a debt collector.—So, again, where there are numerous small debts to be collected, it cannot be expected of executors or trustees that they should personally call on each debtor. Consequently, if under such circumstances they employ, in the usual course of business, a debt collector, and the money collected

<sup>(</sup>l) Challen v. Shippam, 4 Ha. 555; Rehden v. Wesley, 29 B. 213; Matthews v. Brise, 6 B. 239; Moyle v. Moyle, 2 R. & M. 710.

<sup>(</sup>m) Rehden v. Wesley, supra.(n) Cann v. Cann, 51 L. T. 770.

<sup>(</sup>o) Knight v. Earl of Plymouth, 1 Dick. 120. (p) Wren v. Kuton, 11 V. 380.

is lost by reason of the collector's insolvency, the trustees are primâ facie not responsible (q).

15. Joining with others in a sale.—On the principles enunciated in the article now under consideration, it has been held, that if "trustees for sale join with any other person in a joint sale of the trust property, and any other property. whether that person be a trustee himself or be a beneficial owner, they must take care that their share of the purchase-money is paid to them, and the purchaser must take care of that likewise, because he can only pay trust money to the trustees. Therefore, when they do join with other people the purchase-money must be apportioned before the completion of the purchase, and must be paid by the purchaser, the apportioned part coming to the trustees to be paid to them "(r), or, now, to their solicitor, under sect. 17 of the Trustee Act, 1893 (s).

<sup>(</sup>q) Re Brier, Brier v. Evison, 26 C. D. 238.
(r) Per Jessel, M.R., Re Cooper and Allen, 4 C. D. 815. (s) Supra, p. 369.

Art. 44.—Duty of Trustees to act jointly where more than one.

Where there are more trustees than one, all must join in the execution of the trust(t), save only—

- α. Where the settlement or a competent court otherwise directs;
- $\beta$ . As to the receipt of income (u);
- 7. As to such matters as can be lawfully delegated under Art. 43.

This article is a corollary of Art. 43. For, if trustees cannot delegate their duties, it follows that they must all personally perform those duties, and not appoint one of themselves to manage the business of the trust. It is not unusual to find one of several trustees spoken of as the "acting trustee," meaning the trustee who personally interests himself in the trust affairs, and whose decisions are merely indorsed by his co-trustees. The court, however, does not recognize any such delegation; for the settlor has trusted all the trustees, and it behoves each and every of them

(t) Luke v. South Kensington Hotel Co., 11 C. D. 121; Ex parte Griffen, 2 Gl. & J. 116; Re Flower and Met. Board, 27 C. D. 592.

<sup>(</sup>u) As to shares and stocks, see Companies Act, 1862, Cl. 1 of Table A., and same Act, sect. 30; but consider Binney v. Ince Hall Co., 35 L. J. Ch. 363. As to rents, see Townley v. Sherborne, Bridg. 35; Goldsworthy v. Knight, 11 M. & W. 337; and Gough v. Smith, W. N. (1872), p. 18.

to exercise his individual judgment and discretion on every matter, and not blindly to leave all questions to his co-trustees or co-trustee (x).

Illust.—1. Cannot act by vote of majority.—Thus, the act of a majority of private trustees cannot bind a dissenting minority, nor the trust estate. In order to bind the trust estate the act must be the act of all (y).

2. Must all join in receipt.—So, all the trustees must join in the receipt of money, unless, of course, the settlement authorizes one of them to give good receipts and discharges. For, as Kay, J., said, in Flower v. Met. Bd. (z), "The theory of every trust is, that the trustees shall not allow the trust moneys to get into the hands of any one of them, but that all shall exercise control over them. They must take care that they are in the hands of all, or invested in their names, or placed in a proper bank in their joint names. The reason why more than one trustee is appointed, is, that they shall take care that the moneys shall not get into the hands of one of them alone; that they shall take eare that the trust moneys are always under the power and control of every one of them; and they have no right, as between themselves and the

<sup>(</sup>x) Munch v. Cockerell, 5 M. & C. 179.

<sup>(</sup>y) Luke v. South Kensington Hotel Co., supra. It is otherwise, however, with regard to charitable trustees: see Charitable Trusts Act, 1869, s. 13. There is also an exception in the case of trustees of a manor with regard to enfranchisement, as to which, see Copyhold Act, 1887, s. 40.

<sup>(</sup>z) 27 C. D. 592.

cestuis que trust, unless the circumstances are such as to make it imperatively necessary to do so, to authorize one of themselves to receive the moneys "(a).

- 3. Investments should be in joint names.—All investments of trust moneys should be made in the joint names of the trustees, for otherwise it would enable one trustee to realize and appropriate the money (b). But this must of course yield to necessity, as, for instance, where shares were specifically bequeathed to trustees upon certain trusts, and it was found that by the regulations of the company the shares could only be registered in the name of one trustee (c).
- 4. Income.—As a general rule, however, although trustees must join in the receipt of capital, it is permissible for them to allow one of their number to receive the income. Thus, in the case of rents, the trustees may delegate the collection to one of their number or to a rent collector. For it would be impossible for them all to collect the rents (d). But if there is any fear of misappropriation by the collecting trustee, the others should notify the tenants not to pay him again (e). A similar rule applies to the receipt of dividends on stocks or shares, from the necessity of the ease, because the

Bea. 584.

<sup>(</sup>a) See also Lee v. Sankey, 15 Eq. 204; Clough v. Bond, 3 M. & C. 490; and Walker v. Symonds, 3 Sw. 63.
(b) Lewis v. Nobbs, 8 C. D. 595; Swale v. Swale, 22

<sup>(</sup>c) Consterdine v. Consterdine, 31 Bea. 330.
(d) Townley v. Sherborne, 2 W. & T. L. C.
(e) Gough v. Smith, W. N. 1872, p. 18.

companies are not bound to recognize trusts, and always pay to the first of several joint holders (f).

5. Trustee joining in receipt for conformity.-In cases where, from necessity, a trustee may permit his co-trustee to receive moneys owing to the estate (ex. gr., where he permits him to collect rents), then, even though he join in the receipt for such moneys, and thereby acknowledge that he has received them, he will not be liable if he can vrove (g) that he did not in fact receive them, and only joined in the receipt for the sake of conformity (h). For one of several trustees cannot alone give a good receipt, unless expressly empowered to do so by the settlement; nor can trustees empower one of their number to receive and give a good receipt for trust moneys, and all must, therefore, join (i). So that, although at law the signature of a trustee is (or rather was (k) conclusive evidence that the money came to his hands, "equity, which pursues truth, will decree according to the justice and verity of the

<sup>(</sup>f) See sect. 30, Companies Act, 1862, and the acts or charters of all the great companies. But the Court may interfere in case of necessity: Bradford Bank v. Briggs, 12 App. Cas. 27; Binney v. Ince Hall Co., 35 L. J. Ch. 363. As to when the Court will order dividends to be paid to one of several trustees, conf. Re Pryor, 35 L. T. 202; and Re Carr, Carr v. Carr, 36 W. R. 688.

<sup>(</sup>g) Brice v. Stokes, 2 Lead. Ca. 865; Townley v. Sherborne, 2 Lead. Ca. 858; Re Fryer, 3 K. & J. 317.
(h) Fellows v. Mitchell, 1 P. W. 81; Re Fryer, supra.

<sup>(</sup>i) Lew. 233. See Re Belchier, supra; Walker v. Symonds, 3 Sw. 63; Lee v. Sankey, 15 Eq. 204; Re Flower and Met. Board, 27 C. D. 592.

<sup>(</sup>k) Not so since the régime of the Judicature Acts.

fact" (1), and will hold that, under the circumstances, seeing that it is an act which the very nature of his office will not permit him to decline (m), it does not amount to an admission that he actually received the money. It was formerly thought that executors could not claim this privilege, on the ground that one alone could give a good discharge; but this notion has been greatly modified by the case of Wesley v. Clarke (n), and it may now be considered as settled, that, "if the receipt be given for the purpose of mere form, the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in these cases seems to have been whether the money was under the control of both executors" (o). An executor is, however, more strictly responsible than an ordinary trustee for any act by which he reduces any part of the testator's property into the sole possession of his co-executor (p).

6. Must not permit co-trustee to retain trust money.—Even where a trustee may safely permit his co-trustee to receive trust moneys, he will, nevertheless, be liable if he permit him to retain

<sup>(</sup>l) See per Lord Henley, Harden v. Parsons, 1 Ed. 147.

<sup>(</sup>m) Lew. 233. (n) 1 Ed. 357.

<sup>(</sup>o) Per Lord Redesdale, Joy v. Campbell, 1 Sch. & L.

<sup>(</sup>p) Townsend v. Barber, 1 Dick. 356; Candler v. Tillett, 22 B. 263; Hovey v. Blakeman, 4 V. 608; Clough v. Dixon, 3 M. & C. 497; Lees v. Sanderson, 4 Sim. 28.

them for a longer period than the circumstances of the case necessitate (q). Thus, in Walker v. Symonds (r), D., one of three trustees, received part of the trust money, and, with the assent of the other trustees, invested it in East India Company's bills, payable to him. These were paid off, and thereupon S., another of the trustees, wrote to D., requesting him to invest the money. D., however, begged that it might remain in his hands on mortgage. The other trustees assented to this. The mortgage was never, in fact, prepared, although S. made frequent applications to D., who finally died insolvent five years after first receiving the money. Upon this state of facts Lord Eldon said: "The money was laid out with the consent of the trustees on India bills, payable to D., a palpable breach of trust, by placing the fund under his control, secured by little more than a promissory note payable to himself. It was probable that in 1793 the money due on the bills would be paid, and it would be lodged in his hands; and although the court will proceed as favourably as it can to trustees who have laid out the money on a security from which they cannot with activity recover it, yet no judge can say that they are not guilty of a breach of trust if they

(r) Supra; and see also Lewis v. Nobbs, 8 C. D. 591, and Consterdine v. Consterdine, 31 B. 330.

<sup>(</sup>q) Brice v. Stokes, supra; Thompson v. Finch, 8 D., M. & G. 560; Walker v. Symonds, 3 Sw. 1; Hanbury v. Kirkland, 3 Sim. 265; Styles v. Guy, 1 M. & G. 422; Egbert v. Butler, 21 B. 560; Rodbard v. Cooke, 25 W. R. 555.

suffer it to lie out on such a security for so long a time. The trustees were guilty of a breach of trust in permitting the money to remain on bills payable to D. alone, and in leaving the state of the funds unascertained for five years."

- 7. Must not permit co-trustee to sign cheques.—For like reasons, trustees, in whose names trust moneys are banked, should not authorize the bankers to pay cheques signed by one only of their number; for that would be equivalent to giving the sole control of the trust funds to one trustee, whereas the beneficiaries are entitled to the safeguard of the trustees' joint control (s).
- 8. Executor may remit money to co-executor to pay debts.—Again, where one executor lives at a distance from the testator's place of abode, he may remit money to his co-executor, who lives in the immediate vicinity, for the purpose of paying the testator's debts; for "he is considered to do this of necessity. He could not transact business without trusting some person, and it would be impossible for him to discharge his duty, if he were made responsible where he remitted money to a person to whom he would himself have given credit" (t). For like reasons a trustee may intrust his co-trustee with a crossed cheque, signed by both of them, for delivery to the beneficiary (u).

<sup>(</sup>s) Clough v. Bond, 3 M. & C. 490; Trutch v. Lamprell, 20 Bea. 116.

<sup>(</sup>t) Per Lord Redesdale, Joy v. Campbell, 1 Sch. & L. 341; Ex parte Griffin, 2 Gl. & J. 114. See, however, Chambers v. Minchin, 7 V. 193; Langford v. Gascoigne, supra.

<sup>(</sup>u) Barnard v. Bagshawe, 3 D., J. & S. 355.

- 9. May allow title deeds to remain in custody of co-trustee.—On the ground of necessity, trustees may allow the custody of title deeds to remain with one of their number; for any other rule would be productive of the greatest inconvenience (v). But it seems that the rule is different with regard to bonds payable to bearer (x).
- 10. Must be joint mortgagees.—Apart from other reasons, the trust money cannot be advanced to one of the trustees on mortgage, however good the security may seem: for he cannot act both as mortgagor and mortgagee, and without his joinder in the latter capacity, his co-trustees cannot legally act (").
- 11. Must prosecute or defend jointly. So, again, trustees ought, in the absence of very special circumstances, to prosecute or defend an action jointly, and not by separate solicitors. As a general rule, where trustees sever in such proceedings, only one set of costs will be allowed between them out of the trust estate. But where a trustee refuses to join as co-plaintiff in a properly instituted proceeding, and it consequently becomes necessary to make him a defendant, he will be altogether deprived of his costs (z).

The state of the s

<sup>(</sup>v) Per Wood, V.-C., Cottam v. E. C. Ry. Co., 1 J. & H. 243.

<sup>(</sup>x) Lewis v. Nobbs, 8 C. D. 595.

<sup>(</sup>y) Stickney v. Sewell, 1 M. & Cr. 8; Francis v. Francis,

<sup>5</sup> De G., M. & G. 108; Fletcher v. Green, 33 B. 426. (z) Hughes v. Key, 20 Bea. 395; Collyer v. Dudley, T. & R. 421; Gompertz v. Kensit, 13 Eq. 369.

ART. 45.—Duty of Trustee not to set up Jus tertii.

A trustee, who has acknowledged himself as such, must not set up, or aid, the adverse title of a third party against his beneficiary (b). But (semble) he may decline to execute the trust, if he receives information making it doubtful whether he ought to execute it; and he has a right to have the direction of the court on the subject (c).

In Newsome v. Flowers (sup.), a chapel was vested in trustees, in trust for Particular Baptists. Subsequently a schism took place, and part of the congregation seceded, and went to another chapel. Still later, the surviving trustees were induced (not knowing the real object) to appoint new trustees, and vest the property in them. Immediately afterwards, the new trustees—who were in fact attached to the seceding congregation—brought an action to obtain possession of the chapel. Their appointment was, however, set aside, and it was held that they could not raise the adverse claims of the seceders as a defence against the congregation of the chapel, who were

<sup>(</sup>b) Newsome v. Flowers, 30 B. 461. (c) Neale v. Davis, 5 D., M. & G. 258; per Wood, V.-C., and Turner, L. J., Knight-Bruce, L. J., dissentiente.

their beneficiaries; Lord Romilly saying, "It is a common principle of law, that a tenant who has paid rent to his landlord cannot say, 'You are not the owner of the property.' The fact of his having paid rent prevents his doing it. The same thing occurs where persons are made trustees for the owner of property; if they acknowledge the trust for a considerable time, they cannot say that any other persons are their cestuis que trusts."

2. Must not contest the title of their beneficiaries.

—Nor, however honestly trustees may believe that the trust property belongs of right to a third party, are they justified in refusing to perform the trust they have once undertaken, or in communicating with such other person on the subject; but they must assume the validity of the title of their beneficiaries until it be negatived (d).

3. They may appeal to court to relieve them of the trust.—Where, however, trustees have received notice of a paramount claim, and of the intention of the notifying party to hold them responsible if they deal with the fund in a manner contrary to such paramount claim, it is not yet thoroughly well settled whether, in face of such notice, the trustees are bound to go on steadily in executing the trust which they have undertaken, or whether they can apply to the court for relief in the nature of interpleader. In Neale v. Davis (e), an executrix executed a deed of trust, by which she

(e) 5 D., M. & G. 258.

<sup>(</sup>d) Beddoes v. Pugh, 26 B. 407; Lew. 253.

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recited that she intended to appropriate part of her testator's assets in payment of a debt due from him to her, and she then proceeded to declare trusts of such appropriated fund. She, however, died without making the appropriation, but it was subsequently made by her executors. New trustees of the deed of trust were appointed, who executed the usual declaration that they would hold the appropriated fund on the trusts of the settlement. They subsequently refused to carry out the trust, on the ground that they could not safely do so, there being no evidence forthcoming that the original testator was indebted to the settlor at the date of his decease. On these facts it was held, by Wood, V.-C., and Turner, L.J. (Knight-Bruce, L.J., dissentiente), that the trustees were entitled to refuse to execute the trust. Justice Turner said:—"It is said that they knew of this doubt when they accepted the trusts; but I take it to be the law, that if a trustee has accepted a fund upon certain trusts, and then receives information, making it doubtful whether he ought to execute these trusts, he has a right to come to the court for its direction, whether the trusts ought to be executed." Lord Justice Knight-Bruce, however, energetically dissented, saying:-"I am of opinion that it is not competent in law, equity, or honesty, for men so to act. I am of opinion that if, by paying the fund to their cestuis que trusts they would make themselves personally liable to the adverse claimant in the event of his being successful, they were and are bound to perform the trust which they undertook" (f). The doctrine as enunciated in the rule, however, is, it is apprehended, correct. It must be borne in mind that where there is an adverse claim, of the validity of which the trustee is ignorant, he may safely execute the trust (g).

ART. 46.—Duty of Trustee to act gratuitously.

A trustee has no right to charge for his time and trouble (h) except in the following cases:—

- α. Where the settlement provides for it (i).
- $\beta$ . Where he has, at the time of accepting the trust, expressly stipulated for a remuneration (k), and the beneficiaries have freely and without unfair pressure assented to such stipulation (l).

<sup>(</sup>f) Neale v. Davis, supra; see also Neglian v. Roche, Ir. Reps., 7 Eq. 332; Hurst v. Hurst, 9 Ch. App. 762; and as to agents, Nichotson v. Knowles, 5 Mad. 47.

<sup>(</sup>g) Beddoes v. Pugh, supra.
(h) Robinson v. Pett, 2 Lead. Ca. 215. By a recent Act of the Canadian Parliament, trustees in the Dominion are

<sup>authorized to retain a commission.
(i) Robinson v. Pett, supra; Webb v. Earl of Shaftesbury,
7 V. 480; Willis v. Kibble, 1 B. 559.</sup> 

<sup>(</sup>k) Re Sherwood, 3 B. 338; Douglas v. Archbut, 2 D. & J. 148.

<sup>(1)</sup> Ayliffe v. Murray, 2 At. 58.

- Where the trust is before the court, and the trustee has, before accepting the trust, expressly stipulated for such remuneration (m).
- δ. Where one who is not an express trustee has properly traded with another's money under circumstances which make him a constructive trustee of the profits (n).
- E. Where the trust property is abroad, and it is the custom of the local courts to allow remuneration (o).

ILLUST. 1.—Solicitor-trustee must not generally charge.—Thus, a trustee who is a solicitor will not be allowed to charge for his time and trouble or for his professional attendance; for, as was somewhat dryly said by Lord Lyndhurst, in New v. Jones (p), "A trustee placed in the position of a solicitor might, if allowed to perform the duties of a solicitor, and to be paid for them, find it very often proper to institute and carry on legal proceedings which he would not do if he were to derive no emolument from them himself, and if he were to employ another person." The incapacity not only applies to the solicitor-trustee personally, but also

<sup>(</sup>m) Barrett v. Hartley, 12 Jur., N. S. 426; Moore v. Froud, 3 M. & C. 48.

<sup>(</sup>n) Brown v. Litton, 1 P. W. 140. (o) Chambers v. Goldwin, 9 V. 267. (p) 9 Jar. Prec, 338.

to his firm, who cannot, by acting as *his* solicitors, charge profit costs, either in an action, or for preparing leases and the like on behalf of the trust estate (q).

2. Aliter if authorized by the settlement.—But if the settlement provides that the trustee may charge, he will be allowed to do so, although his charges will be strictly limited to those indicated by the settlor. Thus, if a solicitor-trustee is authorized to make professional charges, he will not be allowed to charge for time and trouble expended other than in his position of solicitor (r). But, on the other hand, where a testator by his will authorized any trustee thereof who might be a solicitor to make the usual professional, or other proper and reasonable charges, for all business done and time expended in relation to the trusts of the will, whether such business was usually within the business of a solicitor or not, it was held that the taxing master had power to allow to a trustee who was a solicitor, the proper charges for business not strictly of a professional nature transacted by him in relation to the trust estate (s). And this holds good even where a legacy is given to the solicitor-trustee

(s) Re Ames, Ames v. Taylor, 25 C. D. 72.

<sup>(</sup>q) Re Corsellis, Lawton v. Elwes, 34 C. D. 675. As to profit costs charged by a solicitor-mortgagee against the mortgagor, see Re Roberts, 43 C. D. 52; Field v. Hopkins 44 C. D. 524 (where it was held by Kay, J., that even an express agreement in that behalf was invalid); Re Wallis, Ex parte Liquorish. 25 Q. B. D. 176; Re Doody, Fisher v. Doody, 67 L. T. 650.

<sup>(</sup>r) Harbin v. Darby, 28 B. 325; Re Chapple, Newton v. Chapple, 27 C. D. 584.

conditionally upon his accepting the trust (t). However, in all such cases, the trustees cannot, in the absence of special powers, settle the amount payable to the solicitor-trustee so as to bind the beneficiaries, and the latter are consequently entitled to have the solicitor's costs investigated (t).

3. Exception where solicitor acts for self and another.—There is a curious exception to the rule that a solicitor-trustee cannot, in the absence of an enabling clause, charge profit costs. This exception (known as the rule in Cradock v. Piper(u)) is, that "where there is work done in court, not on behalf of the trustee who is a solicitor alone, but on behalf of himself and a co-trustee, the ordinary principle will not prevent the solicitor, or his firm, from receiving the usual costs, if the costs of appearing for, or acting for, the two, have not increased the expense; that is to say, if the trustee himself has not added to the expense which would have been incurred if he or his firm had appeared only for his co-trustee "(x). The exception in Cradock v. Piper is, however, limited to the costs incurred in respect of business done in an action or matter, and does not apply to business done out of court (x); and where a solicitortrustee is acting for the trust estate, he will not be allowed to make profit costs merely on the ground

<sup>(</sup>t) Re Fish, Bennett v. Bennett, (1893) 2 Ch. 413. (u) 1 M. & G. 664.

<sup>(</sup>x) Per Cotton, L. J., in Re Corsellis, Lawton v. Elwes, 34 C. D. 675.

that a third party (ex. gr., a lessee or mortgagor) has to repay the costs to the trust estate (y).

- 4. Cannot generally claim a salary.—In general, a trustee, whether express or constructive, will not be permitted to claim a salary or any remuneration for managing a trade or business (z). Thus, in Barrett v. Hartley (a), where a trustee had carried on a business for six years, in consequence whereof great advantage had accrued to his beneficiaries, it was held that he had no right to exact or charge any remuneration or bonus in respect of such services; for his exertions were incident to the performance of the duties imposed by the deed of trust which he had accepted.
- 5. Exception.—But this does not apply to one who rightfully becomes possessed of another's money and rightfully trades with it; for he will be entitled to a reasonable remuneration, although he is of course a constructive trustee of the profits of the trade (b). For instance, in Brown v. Litton (c) the plaintiff's testator was the captain of a ship, who, being on a voyage, had 800 dollars which he intended to invest in trade. The

(z) Stocken v. Dawes, 6 B. 371; Burdon v. Burdon, 1 V. & B. 170.

<sup>(</sup>y) Re Corsellis, Lawton v. Elwes, supra; but see and distinguish Art. 47, Illust. 6, infra, p. 400.

<sup>(</sup>a) L. R., 2 Eq. 787. For a case in which, on the appointment of a new trustee by the court, he was authorized to retain a commission, see Re Freeman, W. N.

<sup>(1887),</sup> p. 210. (b) Brown v. De Tastet, Jac. 284; Wedderburn v. Wedderburn, 22 B. 84.

<sup>(</sup>c) 1 P. W. 140.

captain died, and the defendant, who was the mate of the ship, becoming captain in his place, took possession of these 800 dollars, and by judiciously trading with them made considerable profits. Upon a bill being filed against him for an account, the Lord Keeper Harcourt said: "He ought clearly to account for the profits made of the money; the primary intention in carrying abroad this money, was to invest it in trade, and not to return with it home again, and therefore the defendant, having observed the intent of the testator in trading therewith, and having taken such a prudent care in the management of it as (it may be presumed) he would have taken of his own money, the defendant would not have been liable for any loss that might have happened, and to recompense him for his care in trading with it, the master shall settle a proper salary for the pains and trouble he has been at in the management thereof."

(1) A trustee must not use or deal with trust property for his own private advantage (d).

<sup>\*\*</sup> Arr. 47.—Duty of Trustee not to traffic with or otherwise profit by Trust Property.

<sup>(</sup>d) Webb v. Earl of Shaftesbury, 7 V. 488; Ex parte Lacey, 6 V. 625; and see Re Imp. Land Co. of Marseilles, 4 C. D. 566; and Aberdeen Town v. Aberdeen University, 2 App. Cas. 544.

- (2) A trustee is absolutely incapacitated while he remains a trustee from purchasing, or leasing, or accepting a mortgage of trust property either from himself (e) or his colleagues (f), however fair the transaction may be (g), unless:—
  - Under an express power in the settlement; or

 $\beta$ . By leave of a competent court (h).

- (3) A trustee may, however, purchase, or lease, or accept a mortgage of trust property direct from beneficiaries (i); but in that case, if the transaction be impeached, it is incumbent on the trustee to prove (k) affirmatively and conclusively:
  - a. That he and the beneficiaries were at arm's length, and that no confidence was reposed in him;

(f) Ib.; and Whichcote v. Lawrence, 3 V. 740, and Morse v. Royal, 12 ib. 374.

(g) Ex parte Lacey, supra; Ex parte Bennett, 10 V. 393; Gibson v. Jeyes, 6 V. 277.

(h) Farmer v. Deane, 32 B. 327; and see Tennant v. Trenchard, 4 Ch. App. 547.

(i) Gibson v. Jeyes, supra; Morse v. Royal, supra; Exparte Lacey, supra.

(k) Cases in note (i); and also Randall v. Errington, 10 V. 427; Coles v. Trecothick, 9 ib. 247.

<sup>(</sup>e) Fox v. Mackreth, 1 Lead. Cas. 141.

β. That the transaction was for the advantage of the beneficiaries; and

- 7. That full information was given to the beneficiaries of the value of the property, of the nature of their interest therein, and of the circumstances of the transaction.
- (4) A trustee cannot qualify himself to become a purchaser by retiring from a trusteeship with that view (1).

Thus, a trustee must not actively import trust moneys into his trade or business, or use them in speculations of his own; and if he does so (as has been said before) he will be a constructive trustee of the profits; and if there be no profits he will be liable for the breach of trust, and will have to pay compound interest at five per cent., as will be seen hereafter (m). Where, however, there has been no active breach of trust, but only an omission on the part of a trustee, in whose business the settlor had money invested, to settle up the accounts and properly invest the balance, such an omission will not make him liable to account for the profits (n).

2. Must not get lease renewed to himself.—On similar principles, a trustee of leaseholds cannot

<sup>(</sup>l) Ex parte James, 8 V. 337; Spring v. Pride, 4 D., J. & S. 395.

<sup>(</sup>m) Div. V., Ch. I., infra.

<sup>(</sup>n) Vyse v. Foster, L. R., 7 H. L. 318.

use his position for the purpose of getting a new lease granted to himself on the expiration of the term of which he is trustee (o). And this principle has been carried so high, that where a trustee of a lease endeavoured fairly and honestly to treat for a renewal on account of the beneficiaries, and, the lessor positively refusing to grant a renewal for their benefit, the trustee took the lease for himself, it was held that even in such a case it was so difficult to be sure that there was not collusion, that it was incumbent on the trustee to hold the renewed lease for the benefit of the beneficiaries (p).

- 3. Commission paid to trustee by persons employed in the trust business.—Where the solicitors in an administration action presented their client, the trustee, with half their profit costs, Mr. Justice North (while holding that in the administration action he had no jurisdiction in the matter) intimated that if a separate action were brought against the trustee by the beneficiaries to make him hand over the sum so received, he would have no defence (q).
- 4. Accretion to trustee's estate belongs to trust.— Where trust moneys were lent on mortgage, and the mortgagor being a person of eccentric character,

(p) Per Lord Eldon, in Ex parte James, 8 V. 337, at

<sup>(</sup>o) Sandford v. Keech, Sel. Ch. Ca. 61; Bennett v. Gas and Coke Co., 52 L. J., Ch. 98; Re Lord Ranelagh, 26 C. D. 590; and Brinton v. Lulham, 53 L. T. 9.

<sup>(</sup>q) Re Thorpe, Vipont v. Radcliffe, (1891) 2 Ch. 360. For further examples of profits made by fiduciary persons the reader is referred to pp. 118—120, and 205—208, supra.

devised the equity of redemption to "the mortgagee," it was held, that, although the mortgagor did not know that the mortgagee was a trustee. vet, as the devise was made to him as mortgagee, and as it was the trust which caused him to occupy that position, the devise of the equity of redemption belonged to the trust, and not to the trustee beneficially (r).

- 5. Must not sport over trust estate.—Lord Eldon once directed an inquiry whether the right of sporting over the trust property could be let for the benefit of the beneficiaries, and, if not, he thought that the game should belong to the heir of the settlor. The trustee might appoint a gamekeeper, if necessary, for the preservation of the game, but must not keep an establishment of mere pleasure for his own enjoyment (s).
- 6. Rule does not apply to indirect gains.—The rule does not, however, apply where a trustee remotely, and only incidentally, profits by his connection with the trust; as, for instance, where a trustee who is a solicitor lends trust moneys on mortgage to one of his own clients, and thereby obtains a fee from the latter for preparing the security (t).
- 7. Rule inapplicable where trustee is the beneficiary subject to specific charge.—The rule does not apply where the trustee is also the ultimate

<sup>(</sup>r) Re Payne, Kibble v. Payne, 54 L. T. 840.

<sup>(</sup>s) Webb v. Earl of Shaftesbury, 7 V. 488. (t) Whitney v. Smith, 4 Ch. App. 513; and see also Butler v. Butler, 7 C. D. 116. But conf. Re Corsellis, Lawton v. Elwes, 34 C. D. 675.

beneficiary subject to setting aside a specific sum for another. For although in form a trustee, he is substantially beneficial owner, subject to an equitable mortgage for securing the specific sum in question. Thus, in Re Cameron, Cameron v. Cameron (u), a testator gave his real and personal estate to his son A. upon trust to convert, and, out of the proceeds, to set aside and invest 20,000% for the benefit of his son C. for life, with remainders over; and, subject thereto, he gave the residue of the moneys produced by such conversion, to his two sons A. and B. The trustee son, A., neither paid nor appropriated funds to meet the 20,000l. trust legacy, but retained the trust estate in its original state of investment, paying C. meanwhile interest on 20,000l. at 4 per cent. The investments having risen considerably in value, C. and his children claimed to participate in the increase, on the ground that A., the trustee, could not retain profits earned by his own default. The action was, however, dismissed, Stirling, J., saving: "It is argued that the defendant has been guilty of a breach of trust in not investing the legacy, or appropriating proper securities to meet it: and that he cannot be allowed to benefit by such a breach of trust, but must account to the legatees for any profit he has made. If it were made out that the defendant had unwarrantably applied the money of his cestuis que trust to his own purposes -if, for example, the estate of the testator, after

<sup>(</sup>u) (1893) 3 Ch. 468.

payment of debts, had been less than 20,000%, and the defendant had sold the investments and embarked the proceeds in trade—it might be right to make him account for all the profits earned. But what has been done is simply to leave the estate as it was at the testator's death, without making any investment or appropriation to meet the legacy. . . . I think that the residuary legatees ought to be treated, under the circumstances of this case, as the owners of the estate, subject to a charge thereon of the plaintiff's legacy with interest at 4 per cent."

8. Purchases of trust property by trustees .-Perhaps the most important branch of the subject is that relating to the purchase or lease by trustees of the trust property. With regard to such purchases from themselves (as distinguished from purchases from their beneficiaries), the doctrine stands much more upon general principle than upon the circumstances of any individual case. It rests upon this: that the purchase is not permitted in any case, however honest the circumstances, the general interests of justice requiring it to be destroyed in every instance, as no court is equal to the examination and ascertainment of the truth in much the greater number of cases (x). Consequently, under no circumstances can active trustee, nor, indeed, a passive trustee who has been an active one, nor even a person who

<sup>(</sup>x) Per Lord Eldon in Ex parte James, 8 V. 337, at p. 345; and see Beningfield v. Baxter, 12 App. Cas. 167.

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has been erroneously treated by all parties as a trustee (y) (i.e., a trustee de son tort), purchase trust property from himself or his colleagues, either directly or collusively through the intervention of a third party (z). Such a transaction is voidable at the instance of a beneficiary ex debito justitiæ, and without proof of any injury or loss, a fact which ought to be borne in mind by every trustee. Such a sale also affects all subsequent purchasers with notice from the trustee (a); and, therefore, even if a trustee cares to risk such a purchase as between himself and the beneficiaries, he should remember that it practically precludes him from ever parting with the property to a subsequent purchaser. However, this rule does not prevent a trustee selling to a joint stock company in which he is a shareholder; for a sale by a person to a corporation of which he is a member is not, either in form or substance, a sale by him to himself and others. Nevertheless, in such a case, there is such a conflict of interest and duty, that if the sale be impeached by the beneficiaries, the onus will lie on the company to show affirmatively that the trustee had taken all reasonable pains to secure a

<sup>(</sup>y) Plowright v. Lambert, 52 L. T. 646.
(z) Campbell v. Walker, 5 V. 678; Knight v. Majoribanks, 2 M. & G. 12.

<sup>(</sup>a) Aberdeen Town Council v. Aberdeen University, 2 App. Cas. 544; Cookson v. Lee, 23 L. J., Ch. 473.

purchaser at the best price, and that the price given by the company was not inadequate at the time, although a better price might have been obtained by waiting (b). It must also be observed that the fact that a trustee has sold trust property in the hope, subsequently realized, of being able to repurchase it for himself at a future time, is not of itself a sufficient ground for setting aside the sale, where the price was not inadequate at the time, and there was no agreement or understanding existing at the time of the first sale that the purchaser should sell or reconvey the property to the trustee; and the fact that the trustee many years afterwards made a handsome profit by the property makes no difference (c). However, in the case just cited, over twenty years had elapsed without the sale being impeached and many of the parties were dead, and, as the court said, the presumption of law that a transaction was legal and honest is a presumption that is strengthened by lapse of time.

- 9. Same rule applies to agents.—An agent employed for the sale of an estate cannot purchase it for himself, for he is a constructive trustee (d).
- 10. Cannot lease or mortgage to himself.—So trustees cannot lease or mortgage the trust estate

<sup>(</sup>b) Farrar v. Farrar, Limited, 40 C. D. 395.
(c) Re Postlethwaite, Postlethwaite v. Rickman, 37 W. R. 200; and see also Dover v. Buck, 5 Giff. 57; and Baker v. Peck, 9 W. R. 472.

<sup>(</sup>d) Re Boyle, 1 M. & G. 495; De Bussche v. Alt, 8 C. D. 287.

to one of themselves, and if they do so the lessee will have to account for the profits (e).

11. Rule inapplicable to bare trustees.—The rule as to selling to himself only applies where the express or constructive trustee is substantially an active trustee; for where he is the mere depository of the legal estate without any duties, and without ever having had any, he may be a purchaser; for instance, trustees to preserve contingent remainders (f), or persons nominated trustees who have disclaimed (g). But one who was originally an executive trustee, and has become a mere bare trustee by performance of the trusts, would, it is apprehended, be disqualified; for he would have had an opportunity of becoming acquainted with the property and its value (h).

12. May purchase from beneficiary.—But although a trustee is incapable of purchasing from himself or his colleagues, there is no fixed and arbitrary rule that the trustee can, under no circumstances, purchase the interests of his beneficiaries from the beneficiaries themselves. But even in such cases the court regards such purchases with great jealousy, and, if impeached, they cannot stand unless the trustee can affirmatively show that the parties were completely at arm's length

(f) Sutton v. Jones, 15 V. 587; Pooley v. Quilter, 4 Dr. 189.

<sup>(</sup>e) Ex parte Hughes, 6 V. 617; Stickney v. Sewell, 1 M. & C. 8; Francis v. Francis, 5 D., M. & G. 108.

<sup>(</sup>g) Stacey v. Elph, 1 M. & K. 195.
(h) Ex parte Bennett, 10 V. 381.

in making the bargain; that the bargain was a beneficial one to the cestuis que trust; and that the trustee candidly disclosed all facts known to him which could in any way influence the vendors (h).

13. In reference to sales by the beneficiaries, the transaction was upheld where a beneficiary took the whole management of a sale upon himself, and then agreed to sell a lot, which he had bought in, to one of the trustees for sale (i).

14. Whether trustee of share of proceeds can purchase.—A question sometimes arises in practice, whether, on a sale by trustees, the property can be purchased beneficially by a person who is a trustee of a subsidiary settlement by which a share in the proceeds of the sale is settled. Curiously enough, this point never seems to have been decided; but it is submitted that such a purchase might be impeached. For it is the duty of the subsidiary trustee to watch over the interests of his beneficiaries. It is obviously to their interest that the sale shall realize a high price, whereas it is the interest of a purchaser that it shall be sold cheap. By becoming a purchaser, therefore, the subsidiary trustee is acting in a character wholly inconsistent with his fiduciary duty, and little doubt is entertained that, if the sale were impeached by his cestuis que trusts, the onus would be cast on him

 <sup>(</sup>h) Re Worssam, W. N. 1882, p. 61.
 (i) Coles v. Trecothick, 9 V. 234; and Clark v. Swaile,
 2 Ed. 134.

of proving his complete bona fides, and that he gave an adequate price.

- 15. Trustee of trustee's settlement not debarred from purchasing.—Although a trustee cannot purchase from himself, it has been held that the rule does not preclude the trustees of his marriage settlement from purchasing the property (k).
- 16. Mortgage by beneficiary to trustee.—A trustee may take a fair mortgage from his beneficiary; and, in that case, may rely on his possession of the legal estate, as giving him priority over prior mortgagees of whose claims he had no notice when he made the advance (l).
- 17. Purchase by solicitor from client.—So, where a client was very desirous of selling property, and, after vainly endeavouring to do so, finally sold it to his solicitor (who was of course a constructive trustee), and it was proved that the transaction was fair and the price adequate, and indeed more than could have been obtained elsewhere at the time, and the client quite understood his position, it was held that such a sale was good and binding, although it lay upon the solicitor to prove that it was unimpeachable (m). A solicitor purchasing from his client should always make him employ a separate solicitor (n). The rule equally applies

(n) Cockburn v. Edwards, 18 C. D. 455.

<sup>(</sup>k) Hickley v. Hickley, 2 C. D. 190. (l) Newman v. Newman, 28 C. D. 674.

<sup>(</sup>m) Spencer v. Topham, 22 B. 573; 2 Jur., N. S. 865; Gibson v. Jeyes, 6 V. 278; Johnson v. Fesenmayer, 3 D. & J. 13; Edwards v. Merrick, 2 Ha. 60.

where the solicitor purchases, not directly from the client, but from the latter's trustee in bankruptcy (o).

18. Purchase by person occupying a position of confidence towards vendor.—The rule applies even where the party from whom advice is sought is not a professional adviser; for the fact that he accepts the position of adviser places him in a fiduciary position towards the party seeking advice. Thus, T., a young man aged twenty-three, entitled to a moiety of a freehold estate, the entirety of which brought in about 4401. a-year, being pressed for payment of his college debts, amounting to about 1,000l., and being estranged from his father, wrote to his great-uncle for advice and assistance as to the payment of the debts. The uncle deputed the defendant (his nephew) to see T. on the subject. At the interview, T. refused to compromise the debts, but said he would sell his moiety of the estate, upon which the defendant offered him 7,000% for it. This offer was accepted: but before the agreement was signed, the defendant had the property valued, and it turned out that the mines alone under the property were worth 20,000/.; but this fact he omitted to communicate to T. On these facts it was held, at the suit of T.'s heir, that the defendant had stood in a fiduciary relation towards T., which made it his duty to communicate to T. all material information which he had acquired affecting the value of the

<sup>(</sup>o) Luddy's Trustee v. Peard, 33 C. D. 500.

property; and that, as he had not done so, the sale must be set aside (p).

- 19. The rule does not apply to certain constructive trustees.—The rule as to the extreme fairness to be observed in purchasing from cestuis que trusts does not apply to persons who are only constructive trustees by virtue of some business contract entered into with the so-called cestuis que trusts. Thus mortgagees can freely purchase from their mortgagors (q), partners from the representatives of a deceased partner (r), and other persons bearing analogous relations enjoy a similar freedom; for though contracting parties may by a metaphor be said to be trustees for each other, the trust is strictly limited by the contract. They are trustees only to the extent of their obligation to perform that contract, and the trust is limited to the discharge of that obligation(s).
- 20. Purchase by trustee by leave of the court.-Where there are infant beneficiaries, the court will, on the application of the trustee, allow him to purchase, if it can see that, under the circumstances, it is clearly for the benefit of the beneficiaries, but not otherwise (t). The best course of procedure in such an application is to issue a

<sup>(</sup>p) Tate v. Williamson, 2 Ch. App. 55.

<sup>(</sup>q) Knight v. Majoribanks, 2 M. & G. 10. (r) Chambers v. Howell, 11 B. 6. (s) See per Westbury, L.C., in Knox v. Gye, L. R., 5 H. L. 675; but see per Jessel, M.R., Egmont v. Smith, 6 C.

<sup>(</sup>t) Farmer v. Deane, 32 B. 327; Campbell v. Walker, 5 V. 681.

summons under R. S. C. 1883, Order LV. r. 3, asking that it may be inquired whether it is for the benefit of the infant beneficiaries that the trustee should be permitted to purchase for a certain sum. If the chief clerk certifies that it is, the order will be made as a matter of course. In one case in which the present writer was counsel (u), Mr. Justice Pearson ordered the costs of the action to be paid out of the trust estate, on the ground that it was for the infant's benefit, the trustee offering more than the market price; and it is conceived that the course followed by his lordship is correct.

Art. 48.—Duty of Trustee to be ready with his Accounts.

## (1) A trustee must:—

 $\alpha$ . Keep clear and accurate accounts of the trust property (x); and

β. At all reasonable times, at the request of a beneficiary, give him full and accurate information as to the amount and state of the trust property(y), and permit him or his

<sup>(</sup>u) Nunneley v. Nunneley, April, 18th, 1883.

<sup>(</sup>x) Springett v. Dashwood, 2 Giff. 521; Burrows v. Walls, 5 D., M. & G. 253; Newton v. Askew, 11 B. 145, 152; Pearse v. Green, 1 J. & W. 140.

<sup>(</sup>y) Re Tillott, Lee v. Wilson, (1892) 1 Ch. 86; Re Page, Jones v. Morgan, (1893) 1 Ch. 304, 309; Talbot v. Marshfield, 3 Ch. App. 622; Ryder v. Bickerton, 3 Sw. 81.

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solicitor (z) to inspect the accounts and vouchers, and other documents relating to the trust (a).

(2) A trustee is, nevertheless, not bound to supply copies of accounts or trust documents (b), or to supply information which necessitates expenditure (c), except at the cost of the beneficiary requiring the same.

ILLUST.—1. Failure to keep accounts.—The estate of a testator, who died in 1832, was distributed in 1847, as the evidence showed, at the written request of the persons beneficially entitled. Another part of the estate, which fell in in 1852, was distributed, also at the request of the beneficiaries, and in 1871 the acting trustee died. No accounts or vouchers were forthcoming from the trustees. A bill filed in 1872 by one of the beneficiaries against the surviving trustee for administration, was dismissed; but owing to the breach of duty committed by the trustees in not keeping accounts and vouchers, the surviving trustee had to bear his own costs (d). If, however, the action had been successful, the trustee would in all probability have had to pay

(z) Kemp v. Burn, 4 Giff. 348.

<sup>(</sup>a) Cowin v. Gravell, 34 W. R. 735; Ottley v. Gilby, 8 B. 602.

<sup>(</sup>b) Ottley v. Gilby, supra.

<sup>(</sup>c) Re Bosworth, Martin v. Lambe, 58 L. J., Ch. 432. (d) Payne v. Evens, 18 Eq. 356; and see to same effect, Re Page, Jones v. Morgan, (1893) 1 Ch. 304.

the plaintiff's costs as well (e) up to the hearing (f). But, as the reason of this is that such costs are caused by the trustees' neglect to keep and furnish accounts, the plaintiff will not in general be entitled to costs against the trustee beyond the time when the account is actually rendered, or ordered by the court to be rendered, from which time, if the accounts are substantially accurate, the trustee will be entitled to his costs out of the estate (q), or, if the plaintiff sues alone, out of his share in the estate (h). It is no defence that the trustees are illiterate and incapable of keeping accounts; for in that case they would be justified by necessity in employing, and be bound in point of law to employ, a competent agent to keep the accounts for them (i). However, where trustees have rendered no account, or an insufficient one, the court now frequently orders the application for an account to stand over, in order that a proper account may be rendered and vouched out of court, the costs being reserved (k).

2. Inaccurate accounts.—The importance of keeping accounts is shown by the fact, that although the court will generally saddle with costs a trustee whose only fault is that he has

<sup>(</sup>e) Eglin v. Sanderson, 3 Giff. 434; Newton v. Askew, 11 B. 145.

 <sup>(</sup>f) Springett v. Dashwood, 2 Giff. 521.
 (g) Ottley v. Gilby, 8 B. 602.

<sup>(</sup>h) Thompson v. Clive, 11 B. 475.
(i) Wroe v. Seed, 4 Giff. 425, 429.

<sup>(</sup>k) See Re Hayter, 32 W. R. 26, and Hilliard v. Fulford, 4 C. D. 389.

failed to do so, yet where a trustee has kept and furnished accounts, which, by an honest mistake, turn out to be inaccurate, and show an erroneous balance in the trustee's favour, he will be allowed his costs, for he will not have been guilty of any breach of duty, but only of a bonâ fide mistake (l).

3. Supplying information.—"A trustee is bound to give his cestui que trust proper information as to the investment of the trust estate; and where the trust estate is invested on mortgage, it is not sufficient for the trustee merely to say, 'I have invested the trust money on mortgage,' but he must produce the mortgage deeds, so that the cestui que trust may thereby ascertain that the trustee's statement is correct, and that the trust estate is so invested. . . . Where a portion of the trust estate is invested in consols, it is not sufficient for the trustee to say that it is so invested, but his cestui que trust is entitled to an authority from the trustee to enable him to make proper application to the bank in order that he may verify the trustee's own statement; there may be stock standing in the name of a person who admits he is a trustee of it, which at the same time is incumbered; some other person having a paramount title may have obtained a charging order on the stock, or placed a distringas upon it" (m). At the same time, although it is the duty of a trustee

<sup>(1)</sup> Smith v. Cremer, 24 W. R. 51. (m) Per Chitty, J., in Re Tillott, Lee v. Wilson, (1892) 1 Ch. at p. 88.

to give all his beneficiaries, on demand, information with respect to the mode in which the trust fund has been dealt with, and where it is, yet, in the words of Lord Justice Lindley (n), "it is no part of the duty of a trustee to tell his cestui que trust what incumbrances the latter has created. nor which of his incumbrancers have given notice of their respective charges. It is no part of the duty of a trustee to assist his cestui que trust in selling or mortgaging his beneficial interest, and in squandering or anticipating his fortune; and it is clear that a person who proposes to buy or lend money on it, has no greater rights than the cestui que trust himself. There is no trust or other relation between a trustee and a stranger about to deal with a cestui que trust, and although probably such a person, in making inquiries, may be regarded as authorized by the cestui que trust to make them, this view of the stranger's position will not give him a right to the information which the cestui que trust himself is not entitled to demand. The trustee is therefore, in my opinion, under no obligation to answer such an inquiry."

4. Expensive information.—As above stated, a beneficiary is entitled, either personally or by his solicitor, to *inspect* the trust accounts and documents, but if he requires a copy of an account or document he must pay the necessary expense himself; for it is not fair that it should be saddled on the trust estate, nor of course can the trustee be expected to

<sup>(</sup>n) Low v. Bouverie, (1891) 3 Ch. at p. 99.

incur the expense personally (o). On the same ground, where a beneficiary demands information as to his rights under the settlement which cannot be furnished by the trustee without the assistance of a solicitor, the trustee is not bound to incur that expense (or if he be himself a solicitor with power to charge, he is not bound to incur the loss of time), unless the beneficiary is willing to pay the costs of complying with his requisition (p).

(o) Ottley v. Gilby, 8 B. 602.

<sup>(</sup>p) Re Bosworth, Martin v. Lambe, 58 L. J., Ch. 432.

## A CHAPTER IV.

## The Powers of the Trustee (a).

ART. 49. General Powers of Trustees.

- ,, 50. Power of Trustees in relation to the conduct of Sales.
- ,, 51. Power of Trustees to give Receipts.
- ,, 52. Power of Trustees to compound and settle Disputes.
- ,, 53. Power of Trustees to allow Maintenance to Infants.
- " 54. Power of Trustees to pay to Attorney appointed by Beneficiary.
- ,, 55. Suspension of the Trustees' Powers by Administration Action.

## ART. 49.—General Powers of Trustees.

(1) A trustee may exercise such power and discretion as may be expressly confided to him by the settlement, so long as he exercises it bonâ fide, and not for the purpose of benefiting one

<sup>(</sup>a) I have excluded from this chapter any exposition of, or reference to, the powers of managing infants' estates conferred by sect. 42 of the Conveyancing and Law of Property Act, 1881, and also the powers conferred by the Settled Land Act on "trustees for purposes of that Act," because the trustees referred to in those enactments are not ordinary trustees, but rather moral police officers, or guardians, or mere donees of powers.

of the beneficiaries at the expense of the others (a).

- (2) In addition to the power expressly given to him by the settlement, and subject to any restrictions contained therein, and to the provisions of any statute requiring the consent of the court to any act, a trustee may, without application to the court, do such of the following acts as the court would sanction if applied to (b), viz.,
  - a. Acts which are reasonable and proper for the realisation, protection or benefit of the trust property (c); and
  - β. Acts which are reasonable proper for the protection, safety, support or reputation of a beneficiary who is incapable of taking care of himself (d).

(b) Lee v. Brown, 4 V. 369; Inwood v. Twyne, 2 Ed. 153; Seagram v. Knight, 2 Ch. App. 630; Brown v. Smith, W. N. 1878, p. 202.

<sup>(</sup>a) Gisborne v. Gisborne, 2 App. Ca. 300; Austin v. Austin, 4 C. D. 233; Tabor v. Brooks, 10 C. D. 273; Re Blake, Jones v. Blake, 29 C. D. 913; Ld. Gainsborough v. Watcombe Terra Cotta Co., 54 L. J., Ch. 991.

<sup>(</sup>c) Ward v. Ward, 2 H. L. C. 784; Waldo v. Waldo, 7 Sim. 261; Bright v. North, 2 P. H. 220; Bowes v. E. L. Water Co., Jac. 324.

<sup>(</sup>d) Sisson v. Shaw, 9 V. 288; Maberly v. Turton, 14 V.

Provided, that such acts do not benefit one beneficiary at the expense of another (e), and do not interfere with any legal beneficial interest.

ILLUST.-1. Discretionary powers.-The leading case of Gisborne v. Gisborne (f) is the best example of the right of trustees to exercise a discretion expressly given to them by the settlement. There a testator devised his real and personal estate to trustees upon various trusts, one of which was, that "my said trustees, in their discretion and of their uncontrollable authority, pay and apply the whole, or such portion only, of the annual income of my real and personal estate as they shall think expedient, to and for the clothing, board, &c., and for the personal and peculiar benefit and comfort, of my dear wife." The wife also had property of her own, and was a lunatic, and one of the trustees was the residuary legatee under the testator's will. Under these circumstances, the trustees, bonâ fide (as the court found), refused to permit the whole income of the trust fund to be applied for the wife's support in the asylum, and proposed to allow only so much for that purpose as would be

<sup>499;</sup> Cotham v. West, 1 B. 381; Ex parte Green, 1 J. & W. 253; Re Howorth, 8 Ch. App. 415; De Witte v. Palin, 14 Eq. 251; Swinnock v. De Crispe, Free. 78.

<sup>(</sup>e) Seagram v. Knight, supra; Lee v. Brown, supra; Wood v. Patteson, 10 B. 544.

<sup>(</sup>f) 2 App. Ca. 300; and see also Costabadie v. Costabadie, 6 Ha, 410.

sufficient, after taking into account the income of the wife's own property. The House of Lords, on these facts, held, that the trustees had an absolute discretion in the application of the fund, and that so long as they exercised that discretion bonâ fide, the court could not interfere with them; although if no such discretion had existed, the court would have ordered the trust fund to have been applied primarily in the support of the lunatic.

2. So, again, in Tabor v. Brooks (q), the trustees of a marriage settlement had power to apply the income of the settled fund for the benefit of the husband and wife and their children, as they should "in their uncontrolled and irresponsible discretion think proper." The husband and wife subsequently separated, and the trustees, taking the view (bonâ fide) that the husband was in the right, paid the whole of the income to him. On these facts, Malins, V.-C., while expressing an opinion that the trustees were not acting judiciously, declined to interfere with their discretion, there being no proof of mala fides. It would seem, however, from the judgment of the Vice-Chancellor, that in his opinion where the word "uncontrolled" (or its equivalent) is omitted, the court would control a capricious exercise of the trustees' authority. But perhaps this distinction may be respectfully doubted.

<sup>(</sup>g) 10 C. D. 273; and see also Re Lofthouse, 29 C. D. 921, and Re Courtier, Coles v. Courtier, 34 C. D. 136.

3. Discretion sometimes limited to time and manner.—The practitioner must, however, carefully scrutinize the words conferring the authority and discretion, and must not assume that a discretion as to the mode of applying a fund for a person's benefit, gives trustees a discretion as to how much of the fund is to be so applied. Thus, in Re Weaver (h) the trustees were directed to pay the income of the trust property, at such time and in such manner as the trustees should think fit. towards the maintenance of a lunatic during her life, with power to invest any surplus, not required for the purpose, as capital. The Court of Appeal held, however, that the trustees had no such discretion as would oust the jurisdiction of the court to apply the whole of the income for the lunatic's maintenance in exoneration of her own property. Jessel, M.R., in delivering judgment, said: "In Gisborne v. Gisborne there was a power to apply the whole or such portion of the income as they might think fit. In the present case the trustees have only a discretion as to the time and manner of the application." So, too, where absolute discretion has been given to trustees to do a particular act (ex. gr., to sell the trust property), the court cannot compel them to exercise the power; but if they do exercise it, the court will see that they do not exercise it improperly or unreasonably (i).

<sup>(</sup>h) 21 C. D. 615.

<sup>(</sup>i) Tempest v. Lord Camoys, 21 C. D. 571; Marq. of

4. Powers in the nature of trusts.—A careful distinction must also be made between discretionary powers and powers coupled with a duty. Where a power is merely part of the machinery provided by the settlor for effectually executing a general trust of management, then, even although discretionary in form, its exercise will be enforced by the court in cases where the non-exercise of the power would paralyse the entire management (i). For instance, where a testator devises divers real estates to trustees, in trust to manage them during the minority of an infant, with power to lease in their discretion, the trustees will not be allowed to decline to exercise the power of letting. For, as Bowen, L.J., said in Re Courtier, Coles v. Courtier (k), "one can understand that, where the machinery for management of the estates is given to the trustees, and the court undertakes to enforce the trusts for management, it is right for it to compel the trustees to utilize the machinery entrusted to them." In fact, the court looks at the substance rather than the form; and where what appears to be a mere discretionary power is, in reality, part of a trust for management, the court will make the language bend to the implied intention, and order the trustees to exercise the power.

(k) 34 C. D. 136.

Camden v. Murray, 16 C. D. 161; Re Blake, Jones v. Blake, 29 C. D. 913; Re Courtier, Coles v. Courtier, supra; and Re Burrage, Burrage v. Burningham, 62 L. T. 752.

<sup>(</sup>j) Tempest v. Lord Camoys, 21 C. D. 576, note; Nickisson v. Cockhill, 3 D. & S. 622.

- 5. Implied discretionary powers.—With regard to the principles enunciated in sub-clause (2) (in relation to the unexpressed authority of a trustee), the case of Ward v. Ward (1) may be cited. There, by the immediate realization of the trust property, the trustee would have ruined one beneficiary from whom a large debt was due to the trust estate, and would have very seriously prejudiced others. stead of doing so, the trustee made an arrangement with the debtor for payment of the money by instalments; and it was held that he was justified in having taken that course, because he had exercised a sound discretion, and such as the court would have approved. But no practitioner should venture to advise a trustee to take upon himself the risk of adopting such a course. In all such cases a trustee should apply for the sanction of the court, under the provisions of Ord. LV. r. 3.
- 6. Power to do all necessary acts for protecting the trust property.—So, again, as was said by Lord Cottenham in *Bright* v. *North* (m), "Every trustee is entitled to be allowed the reasonable and proper expenses incurred in protecting property committed to his care. But if they have a right to protect property from immediate and direct injury, they must have the same right where the injury threatened is indirect but probable;" and, therefore, his lordship allowed the

(1) 2 H. L. C. 784.

<sup>(</sup>m) 2 Ph. 220; and see Stott v. Milne, 25 C. D. 710.

trustees (who were, in that instance, trustees of public works) the expenses of opposing a bill in parliament which would have been prejudicial to those works if passed. Here again, however, trustees should always be advised to obtain the sanction of the court before incurring such serious expense.

- 7. Power to take necessary steps for keeping property in repair.—On the same grounds, a trustee whose duty it is to keep property, forming part of the trust estate, in repair, may, it would seem, retain income for that purpose, but without prejudice to the ultimate rights of the tenant for life and remainderman *inter se* (n).
- 8. Power to exchange policy for a fully paid up one.—On similar grounds, it would seem that a trustee may surrender a policy of assurance forming part of the trust property, in exchange for a fully paid up one of less amount, in cases where the party liable to pay the premiums cannot possibly do so (o). But of course no sane lawyer would allow a trustee who was his client to do this without the sanction of the court.
- 9. Power to thin timber.—So, again, in cases where the court would, if applied to, authorize the cutting down of timber which has arrived at maturity, and which would only degenerate if allowed to stand, or where it is necessary to cut it

<sup>(</sup>n) Re Fowler, Fowler v. Odell, 16 C. D. 723; but see supra, pp. 295 et seq.
(o) Re Steen, Steen v. Peebles, 25 L. R. Ir. 544.

for the purpose of thinning it, the trustee may fell it on his own authority (p).

- 10. Power to grant certain leases.—On the same principle, a trustee who has the management of property, may grant a reasonable agricultural lease (q), unless expressly or impliedly (r) restrained from doing so by the settlement. But he may not grant a mining lease, for that would benefit the tenant for life at the expense of the reversioner (s). Moreover, where there is a tenant for life, his consent would, it is conceived, now be necessary under section 56 of the Settled Land Act, 1882.
- 11. No power to make problematical or speculative improvements.—On the other hand, trustees must not do acts, however beneficial they may possibly be to the property, if they are in their nature unreasonable and problematical. For instance, they ought not to make merely ornamental improvements (t), nor take down a mansion-house for the purpose of rebuilding a better one (u), nor build a villa for the mere im-

<sup>(</sup>p) Waldo v. Waldo, 7 Sim. 261; and see Seagram v. Knight, 2 Ch. App. 630; but see Illust. 16, p. 427, infra.

<sup>(</sup>q) Naylor v. Arnitt, 1 R. & M. 501; Bowes v. E. L. Water Co., Jac. 324; Att.-Gen. v. Owen, 10 V. 560; Fitzpatrick v. Wary, L. R. Ir. 35.

<sup>(</sup>r) Evans v. Jackson, 8 Sim. 217; and see Michells v. Corbett, 34 B. 376.

<sup>(</sup>s) Wood v. Patteson, 10 B. 544. But this is now provided for on equitable terms by the Settled Land Act, 1882.

 <sup>(</sup>t) Bridge v. Brown, 2 Y. & C. 181.
 (u) Bleazard v. Whalley, 2 Eq. Rep. 1093.

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provement of the estate (x). If, however, they are by the settlement expressly given a power "generally to superintend the management of the estate," it would seem that their powers of management are almost unlimited, so long as they are exercised bonâ fide (y). Trustees are also empowered to carry out certain specified improvements by the Improvement of Land Act, 1864.

- 12. Power to retain married women's trust funds to enable them to claim equity to a settlement.— With regard to acts for the beneficiaries, a familiar instance occurs in the case of trusts of personalty for married women, where, if the trustee paid over the fund to the husband, the wife would probably get no benefit from it. In such cases the trustee is justified, if he thinks fit, in refusing to pay the money to the husband, and in paying it into court instead, so that the wife may have every facility for enforcing her equity to a settlement (z). But this right has, it is apprehended, ceased in the case of property coming under the provisions of the Married Women's Property Act, 1882.
- 13. Power to allow maintenance to infants.—So, trustees might always allow, by way of mainte-

(x) Vyse v. Foster, L. R. 7 H. L. 318.

(z) Wat. 360; Re Swan, 2 H. & M. 34; Re Bendysche, 3 Jur., N. S. 727.

<sup>(</sup>y) Bowes v. E. Strathmore, 8 Jur. 92; and see also as to powers of building, &c., Re Leslie, 2 C. D. 185; and consider principle in Gisborne v. Gisborne, 2 App. Cas. 300.

nance, a competent part of the income of property to the father of an infant beneficiary (a), where the father could not support it according to its position (b), even where there was a trust for accumulation (c), if the circumstances showed that the settlor looked on the infant as his heir (d); and, if the infant were an orphan, maintenance might be allowed to the mother (e), or stepfather (f), whether they could support it or not. And now, as will be seen under Article 53 (infra), the powers of trustees in relation to the maintenance of infants are greatly enlarged. It has been also held that a trustee may under special circumstances, as, for instance, where the capital is considerably under a thousand pounds (g), allow maintenance out of the capital: but a trustee would be very ill-advised to take upon himself the responsibility of doing so (h).

14. Power to advance.—Upon the same principle, a trustee may apply part of an infant's

<sup>(</sup>a) Sisson v. Shaw, 9 V. 288; Maberly v. Turton, 14 V. 499; Cotham v. West, 1 B. 381.

<sup>(</sup>b) Maintenance has been allowed to a father with an income of 6,000l. a year (Jervoise v. Silk, 1 G. Coop. 52; and see Re Allan, Havelock v. Havelock, 17 C. D. 807).

<sup>(</sup>c) Collins v. Collins, 32 C. D. 229; Re Allan, Havelock v. Havelock, supra; Re Colgan, 19 C. D. 305; Re Thatcher, 26 C. D. 426.

<sup>(</sup>d) See Re Alford, Hunt v. Parry, 32 C. D. 382.

<sup>(</sup>e) Douglas v. Andrews, 12 B. 310.

<sup>(</sup>f) Lew. 492, commenting on Billingsley v. Critchett, 1 B. C. C. 268, as affected by 4 & 5 Will. 4, c. 76, s. 57.

<sup>(</sup>g) Barlow v. Grant, 1 Ver. 255; Ex parte Green, 1 J. & W. 253; Re Howarth, 8 Ch. App. 415; De Witte v. Palin, 14 Eq. 251.

<sup>(</sup>h) See Walker v. Wetherell, 6 V. 255.

capital for its advancement in the world (i). But here again (in the absence of express power) he would be undertaking an unnecessary risk in acting without the sanction of the court.

- 15. Secus where infant only contingently entitled.—But where, by making an advancement, the trustee would injure the contingent rights of another beneficiary, he will do it at his peril as against the latter (k). For instance, where 100% was bequeathed upon trust to apply the income towards the maintenance and education of A. during his minority, and upon trust to pay the corpus to him on attaining twenty-one, but in case of his dying before that age, upon trust for X., it was held that, as against X., the trustees had no authority to advance part of the capital to A., who died before attaining his majority (l).
- 16. No power to interfere with legal remainders.—On the principle that the court in general cannot interfere with legal interests, it is apprehended that a trustee for another for life only, (the trustee merely taking an estate pur autre vic,) would not

(i) Swinnock v. Crisp, Free. 78; Boyd v. Boyd, 4 Eq. 305; Roper-Curzon v. Roper-Curzon, 11 Eq. 452.

<sup>(</sup>k) Worthington v. McCrear, 23 B. 81; Re Breed, 1 C. D. 226; but under power conferred by the Conveyancing and Law of Property Act, 1881, trustees of settlements may now allow maintenance to infants contingently entitled (Re Cotton, 1 C. D. 232), in cases where, upon their shares becoming vested, they would be entitled to past income (Re George, 5 C. D. 837); but not otherwise (Re Judkin, 25 C. D. 743; Re Dickson, Hill v. Grant, 29 C. D. 331; and Re Jeffrey, Bunt v. Arnold, (1891) 1 Ch. 671; and see art. 53, infra).

(l) Lee v. Brown, 4 V. 362.

be justified, without the consent of the *legal* remainderman, in cutting timber which had arrived at maturity (as in Illustration 9), inasmuch as, not being the trustee for the remainderman, he could not do acts for the benefit of the estate generally which would be in derogation of the latter's legal rights (m); nor could he invest the proceeds so as to equitably arrange the benefit between the tenant for life and the remainderman.

17. So, it would seem, that although, where an equitable beneficiary is an infant, the court can authorize trustees to mortgage the trust property for the purpose of raising money to carry out necessary repairs (n), yet, on the other hand, where the legal estate is not in the trustees, but in an infant tenant for life, the court has no jurisdiction to do so (o).

Art. 50.—Power of Trustees in relation to the conduct of Sales.

- (1) Where a trust for sale is vested in trustees they may carry out the sale as follows:
  - a. Irrespective of the date of the settlement they may sell in such

<sup>(</sup>m) See and consider Seagram v. Knight, 2 Ch. App. 630, and compare it with Waldo v. Smith, 7 Sim. 261, and Gent v. Harrison, John. 517.

<sup>(</sup>n) Jackson v. Talbot, 21 C. D. 786. (o) Jesse v. Lloyd, 48 L. T. 656.

manner, and either alone or jointly with any adjoining or any coowner, as (having regard to the nature of the property, the title, and all the surrounding circumstances) may be reasonable and for the probable benefit of the beneficiaries (p). But, unless they fall under the next paragraph, they cannot buy in the property at an auction (q), or, semble, rescind a contract for sale.

β. If the trust was created by a settlement coming into operation between the 27th August, 1860, and the 1st January, 1882, then (subject to anything to the contrary contained in the settlement), they may safely, and without the necessity of making inquiries as to the best mode of selling, sell together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit; with power

<sup>(</sup>p) See Re Cooper and Allen, 4 C. D. 802.
(q) Taylor v. Tabrum, 6 Sim. 281; Ex parte Lewis, 1 Gl. & J. 69.

to vary or reseind any contract for sale, and to buy in at any auction, and to resell (r).

- γ. If the trust was created by a settlement coming into operation on or after the 1st January, 1882, then (subject to anything to the contrary contained in the settlement) they may exercise the powers specified in sub-clause β, with the addition that they may sell subject to prior charges or not, and may concur with any other person in selling, without the necessity of making inquiries as to whether the course adopted is the best under all the circumstances (s).
- a. By leave of the court (but not otherwise) they may sell the surface, reserving the minerals, with incidental powers of working the same (t).
- (2) No sale made by a trustee since Christmas, 1888, can be impeached by any beneficiary upon the ground

(t) Trustee Act, 1893, sect. 44.

<sup>(</sup>r) Lord Cranworth's Act, 23 & 24 Vict. c. 145, ss. 1, 2, and 34. Although this Act only refers to trustees with power of sale, it is apprehended that a trust for sale is clearly within the Act (see 3 David. Prec. 3rd ed. 565).

<sup>(</sup>s) Trustee Act, 1893, sect. 13, sub-sect. 1, re-enacting Conveyancing and Law of Property Act, 1881, sect. 35.

that any of the conditions subject to which the sale was made were unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate(u); nor can any such sale after execution of the conveyance be impeached as against the purchaser upon such ground, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made (v). And no purchaser, upon any sale made by a trustee, is now at liberty to make any objection against the title upon the ground aforesaid (t).

(3) A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of section two of the Vendor and Purchaser Act, 1874(u).

ILLUST.—1. Power to sell under the old law independent of statute.—For an example of the law relating to old settlements, the case of Re Cooper and Allen(x) may be cited. The question in that case was whether persons who were mortgagees

<sup>(</sup>u) Trustee Act, 1893, sect. 14.

<sup>(</sup>v) Ibid., sect. 15.

<sup>(</sup>x) 4 C. D. 802, and cases there cited.

of a life estate, and also mortgagees (for a different sum) of the reversion, with power of sale under both mortgages, could sell the fee simple in possession. Although that was a case of mortgagees selling, and not of trustees in the strict sense, yet, as Jessel, M.R., pointed out, "a mortgagee selling, is, in effect, a trustee with reference to the property comprised in the mortgage." His Lordship, in giving judgment, said: "First of all, on principle, what is the duty of trustees for sale? It is their duty to sell the estate to the best advantage they can, that is, in the manner most beneficial to the cestuis que trust. It is, further, their duty to take care to receive the purchase-money, and to invest it properly according to the trusts. therefore, the sale of the property can be effected at a higher price by joining with somebody else, so far from that being a breach of that principle, they are only carrying out their trusts, and performing their duty in so obtaining that higher price. . . . Secondly, it is their duty, as I have already said, to receive the purchase-money. If, therefore, they do join with any other person, whether that other person be a trustee himself or be a beneficial owner, they must take care that their share of the purchase-money is paid to them, and the purchaser must take care of that likewise, because he can only pay trust money to the trustees. Therefore, where they do join with other people, the purchasemoney must be so apportioned before the completion of the purchase, and must be paid by the purchaser; the apportioned part coming to the

trustees being paid to them." His Lordship then proceeded to point out that the trustees were the proper persons to make the apportionment, and that unless a purchaser has notice that the apportionment is an improper one, he would be quite safe in accepting the trustees' apportionment; and then examined the cases in which the joinder with other parties was prima facie right, and when it required evidence to support it, pointing out that in the case of adjacent properties, as a general rule, trustees should not agree to a joint sale without some evidence of its desirability, but that in the case of trustees entitled only to a limited or partial estate in property, it is obviously, and without the necessity of proof, for the benefit of the estate that they should join in a sale of the entire fee simple with the other parties interested. That being so, of course it could make no difference that the mortgagees of the life estate, and of the remainder, happened to be the same individuals; and consequently his Lordship held that they were entitled to sell the fee simple in possession by one sale and at one price.

2. No power formerly to buy in at a sale by auction.—As an instance of the inability of trustees under old settlements to buy in the property at an auction, may be mentioned a case in which the assignees of a bankrupt had bought in two lots of the bankrupt's property, and upon the subsequent sale of the two lots, had gained on one, and lost on the other. It was held by Lord Eldon, that the original buying in of the two lots being a

breach of trust, the assignees were liable for the loss (if any) on each lot, and could not set off the gain on one against the loss on the other (y).

3. Must not impose unnecessarily restrictive conditions.—Prior to the passing of the Trustee Act, 1888, trustees for sale were not permitted to impose unnecessarily stringent and depreciatory conditions (z). However, by that Act (repealed and re-enacted by the 14th section of the Trustee Act, 1893) the power of trustees to impose depreciatory conditions was considerably extended, as to which, the reader is referred to p. 312, supra.

ART. 51.—Power of Trustees to give Receipts.

"The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application

<sup>(</sup>y) Ex parte Lewis, 1 Gl. & J. 69. (z) Dance v. Goldingham, 8 Ch. App. 902; Dunn v. Flood, 25 C. D. 629; and on App. 28 C. D. 586.

or being answerable for any loss or misapplication thereof." (a).

The above rule is comparatively modern, dating only from 1881, when it formed section 36 of the Conveyancing and Law of Property Act of that year. It applies, however, quite irrespective of the date of the settlement, and consequently, now, few, if any, questions of practical interest can arise under the old law. All, therefore, that need be said is, that where, previously to the 1st of January, 1882, a person paid purchase or other moneys to trustees, the payer was bound to see to the application of such moneys (b), except in the following cases, viz.:—

- (1) Where the settlement expressly exempted him from doing so;
- (2) Where the settlement was dated subsequently to the 28th August, 1860 (c) (or, in the case of purchase-money, subsequently to 13th August, 1859 (d)), and the duty was not expressly cast upon him by the settlement;
- (3) Where the trusts of the money were not simple trusts (e), or, being simple trusts, it was gathered from the settlement that the settlor contemplated the possibility of any of the beneficiaries being under disability, at the date of the sale or pay-

<sup>(</sup>a) Trustee Act, 1893, seet. 20.

<sup>(</sup>b) Dart, 670, 6th ed.; Elliott v. Merryman, 1 L. C. C4.

<sup>(</sup>c) 23 & 24 Viet. c. 145, s. 12. (d) 22 & 23 Viet. e. 35, s. 23.

<sup>(</sup>e) See Storey, § 1134, and cases cited as illustrations, infra.

ment (f), or in any other case where an intention to impose the duty on the purchaser or person paying could not be reasonably inferred (g).

It may perhaps be respectfully observed, that the wording of the new power is not beyond criticism; for it might be, speciously enough, urged that the words "the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust," only enable the money to be paid to the trustee where the trust is not a simple trust; and that, in fact, the payer is left to decide the same question as was imposed upon him by the old law, viz. whether the purchase-money is payable to the trustee or to the beneficiaries. It is, however, apprehended that such criticism would not prevail, inasmuch as, if acted on, it would practically make the new power entirely nugatory and meaningless. The wording of the repealed section of Lord Cranworth's Act (h), was, however, free from all doubt, and might, it is submitted, have been re-enacted with advantage (i).

<sup>(</sup>f) Dart, 671, 6th ed.; Sowarsby v. Lacey, 4 Mad. 142; Lavender v. Stanton, 6 ibid. 46; Balfour v. Welland, 16 V. 151; Breedon v. Breedon, 1 R. & M. 413.

<sup>(</sup>g) Dart, 673, 6th ed.; and see generally Elliott v. Merryman, supra.

<sup>(</sup>h) 23 & 24 Vict. c. 145, s. 12.

<sup>(</sup>i) For examples of the old law, the reader is referred to Elliott v. Merryman, 1 L. C. 64; Johnson v. Kennett, 3 M. & K. 624; Eland v. Eland, 4 M. & C. 420; Forbes v. Peacock, 1 Ph. 717; Robinson v. Lowater, 5 D., M. & G. 272; Re Langmead, 7 D., M. & G. 353; Sowarsby v. Lacey, 4 Mad. 142; and Dart's V. & P., 672, 6th ed.

ART. 52.—Power to compound and to settle Disputes.

"(1) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks suffi-

cient" (k).

"(2) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrange-

<sup>(</sup>k) Trustee Act, 1893, sect. 21, sub-sect. 1.

ment, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith "(1).

"(3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained "(m).

The above article constitutes the first three subsections of section 21 of the Trustee Act, 1893, which is merely a re-enactment of section 37 of the Conveyancing and Law of Property Act, 1881. What the effect of the section may be is by no means clear. In Re Owens (n), the late Sir George Jessel, M.R., intimated that the probable effect of it was to "revolutionize the law on the subject," and to make the question in every case one entirely of good faith, quite apart from any question of prudence. On the other hand, it has been suggested that the section is merely a statutory expression of the law of the court (o),

<sup>(</sup>l) Trustee Act, 1893, sect. 21, sub-sect. 2.

<sup>(</sup>m) Ibid., sub-sect. 3. (n) 47 L. T. 61; and see pp. 308, 309, supra.

<sup>(</sup>o) See Lewin, 512, 7th ed.; Wiles v. Gresham, 5 D., M. & G. 770; Ex parte Ogle, 8 Ch. App. 715.

with this important difference, that it "shifts the onus of proof, where any particular transaction is impeached, from the trustee to the cestui que trust. Formerly a trustee had to justify his action in compromising, compounding, &c.; henceforth the dissatisfied cestui que trust must prove impropriety of motive" (p). However, in a recent case, Lord Justice Lopes laid it down broadly, that the only excuse for not taking action to enforce payment of a debt due to the trust, is "a well found belief on the trustee's part, that such action would be useless, and that the burden of proving the grounds of such well founded belief is on the trustee" (q). If this be indeed so, it is difficult to give any meaning whatever to the section; but it is only fair to add that the section was not drawn to the attention of the court when the Lord Justice made the above-quoted observations, and that very probably it would not have been applicable to that case (r).

It may perhaps be pointed out, that although the wording of the Act is open to criticism, it must (it is conceived) be construed to mean that the power is to be exercised by not less than two trustees, unless a sole trustee is expressly authorized to execute the trusts, and cannot be construed (as doubtfully suggested by the learned authors above quoted) to enable any two of a greater

<sup>(</sup>p) Brett and Clerke's Conveyancing, &c. Acts, 3rd ed., 159.

<sup>(</sup>q) Re Brogden, Billing v. Brogden, 38 C. D. 546, 574. (r) See also pp. 304, 309, supra.

number of trustees to compromise or compound without the joinder of their fellows.

## ART. 53.—Power to allow Maintenance to Infants.

- (1) Where any property was, or is, held by trustees, in trust for an infant for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age:
  - a. The trustees may, in their discretion, make an allowance for his maintenance and education, whether there be any other fund applicable to the same purpose, or any person bound by law to provide for such maintenance and education or not, and may pay it to the guardian or parent (t) of the infant instead of expending it directly themselves (u).
  - β. Since the 1st January, 1882, they may make such allowance, not only

<sup>(</sup>t) Re Cotton, 1 C. D. 232.

<sup>(</sup>u) Lord Cranworth's Act, 23 & 24 Vict. c. 145, s. 26.

for maintenance and education, but also otherwise for the benefit of the

 $\inf (x)$ .

(2) Provided, nevertheless, that the above powers do not authorize the allowance of maintenance where the infant on attaining twenty-one would only be entitled to the corpus, and not to the intermediate interest (y).

ILLUST.—1. Cases to which the power applies.—Although the statute allows maintenance out of the income of a contingent legacy or fund, yet if, on the true construction of the settlement, that income is payable to some one else during the infancy, and is not to be accumulated so as to pass along with the corpus if and when it vests, the infant will not be entitled to be maintained. For if he were, his maintenance would come, not out of his own contingent property, but out of somebody else's income, which would be manifestly unjust. Consequently the first question which the practitioner has to solve in all cases of maintenance is, whether or not the income of the fund will go

(x) Conveyancing and Law of Property Act, 1881, s. 43.

<sup>(</sup>y) Re Dickson, Hill v. Grant, 29 C. D. 331; Re Judkin, 25 C. D. 743; Re George, 5 C. D. 837; Re Collins, Collins v. Collins, 32 C. D. 229; Re Jeffery, Burt v. Arnold, (1891) 1 Ch. 671; Re Burton, Banks v. Heavens, (1892) 2 Ch. 38; Re Humphries, 62 L. J., Ch. 498; Re Adams, (1893) 1 Ch. 329.

along with the capital if and when the capital vests in the infant. If it will, then maintenance may be safely allowed. If it will not, then maintenance must be refused. Thus, where the rents were directed to be accumulated during the infancy. and the proceeds to be invested in the purchase of real estate, it was held that maintenance must be refused (z). And so where a legacy is given to a child if and when it attains twenty-one, then, as the intermediate income is undisposed of, and goes to the residuary legatees, the infant can have no maintenance (a). But, on the other hand, where a legacy was given to trustees immediately upon trust to invest it, and to pay and divide it amongst a class of grandchildren contingently on their attaining twenty-one, with remainders over, it was held that by the immediate gift to trustees, the legacy was severed from the rest of the estate, and segregated and set apart, and that the income went with the corpus, so that maintenance could be ordered (b).

The rule was tersely expressed by Fry, J., in Guthrie v. Walrond (c) as follows:—"I think the law is plain, that when a specific legacy is given

<sup>(</sup>z) Re Alford, Hunt v. Parry, 32 C. D. 383; and see Re Jeffery, Burt v. Arnold, (1891) 1 Ch. 671.

<sup>(</sup>a) Guthrie v. Walrond, 22 C. D. 573; but see and distinguish Re Adams, Adams v. Adams, (1893) 1 Ch. 329.

<sup>(</sup>b) Re Medlock, Ruffle v. Medlock, 55 L. J. Ch. 738. (c) 22 C. D., at p. 578. The dicta of Jessel, M.R., in Long v. Ovenden, 16 C. D. 691, to the contrary, are inconsistent with this case and with Re Medlock, Ruffle v. Medlock, supra; and have been disapproved by Chitty, J., in Re Clements, W. N. (1894), p. 29.

on the happening of a contingency, the interest upon it, and any accretions to it before the happening of the contingency, fall into the residue of the testator's estate, or go to his next of kin, as the case may be. But when a specific legacy is vested at once in the legatee, and the enjoyment only is postponed until the happening of the contingency, the interim interest and accretions go to the legatee.

2. Contingent share of residue.—Where a testator bequeaths a share of residue to such of a class as shall attain twenty-one, it would seem that so long as they are all infants they are entitled to maintenance, on the curiously refined ground that although they do not take an interest in the income qua income of the capital to which they are contingently entitled, yet as it is undisposed of income, it becomes part of the residue itself, and the infants take a contingent interest in it as residuary legatees (d). Whether, however, under such a gift, the whole income is not payable to such of the class as have for the time being attained twenty-one to the exclusion of the infants, appears to be doubtful (e): but it is conceived that it is not, and that Mr. Justice North's decision in Re Jeffery, Burt v. Arnold (e) to the contrary effect, was decided upon an erroneous reading of Furneaux v. Rucker (f), which is inaccurately

(e) Conf. Re Jeffery, Burt v. Arnold, (1891) 1 Ch. 671; and Re Burton, Banks v. Heavens, (1892) 2 Ch. 38.

(f) W. N. (1879), 135.

<sup>(</sup>d) Re Adams, Adams v. Adams, (1893) 1 Ch. 329, North, J., following Re Burton.

reported (g), and that Mr. Justice Chitty's decision in Re Burton (h) is supported by the older authority of Rochford v. Hackman (i).

3. Residuary gift to infant.—It may be added that a gift of residue to an infant makes the executor a trustee, and enables him to allow maintenance under this article (k).

### ART. 54.—Power of Trustees to pay to Attorney appointed by Beneficiary.

A trustee acting or paying money in good faith under or in pursuance of any power of attorney is not liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying. But this does not affect the right of any person entitled to the money against the person to whom

 <sup>(</sup>g) See Re Adams, Adams v. Adams, supra.
 (h) Supra.
 (i) 9 Ha. 475.

<sup>(</sup>k) Re Smith, 42 C. D. 302.

payment is made, and the person so entitled has the same remedy against the person to whom the payment is made as he would have had against the trustee (l).

The above article, although restricted in terms to trustees, is but little more than the general law now applicable to all persons acting upon the faith of a power of attorney, inasmuch as sect. 47 of the Conveyancing and Law of Property Act, 1881, gives protection to every person so acting, notwithstanding that before the payment or act the donor of the power had died, or become lunatic or of unsound mind, or bankrupt, or had revoked the power, if the fact of such death, lunacy, unsoundness of mind, or bankruptey or revocation, was not, at the time of the payment or act, known to the person making or doing the same.

Art. 55.—Suspension of the Trustee's Powers by Administration Action.

(1) Where a judgment has been made for the execution of the trust by the court, or before judgment an injunction has been granted, or a receiver appointed,

<sup>(</sup>l) Trustee Act, 1893, sect. 23, re-enacting 22 & 23 Vict. c. 35, s. 26.

the trustee cannot exercise his powers, except with the sanction of the court(m).

- (2) But although the sanction of the court must be obtained, the court will not interfere with a discretion reposed in a trustee and expressed to be absolute and uncontrollable, so long as it is exercised in good faith (n).
- (3) The mere fact that a writ has been issued for administration of the trust does not affect the powers of the trustee(o).
- (4) A decree for administration does not absolve a trustee from the performance of his duties (p).

ILLUST.—1. After judgment.—Thus a trustee cannot prosecute or defend legal proceedings (q), nor execute a power of sale (r), nor make repairs (s), nor invest (t), nor exercise any other power, after

<sup>(</sup>m) Mitchelson v. Piper, 8 Sim. 64; Shewen v. Vanderhorst, 2 R. & M. 75; Minors v. Battison, 1 App. Cas. 428; Eastwood v. Clarke, 23 C. D. 134.

<sup>(</sup>n) Gisborne v. Gisborne, 2 App. Cas. 300; and see illusts. 1 to 3, Art. 49, supra, p. 418.

<sup>(</sup>o) Berry v. Gibbons, 8 Ch. App. 747.

 <sup>(</sup>p) Garner v. Moore, 3 Dr. 277.
 (q) Jones v. Powell, 4 B. 96.
 (r) Walker v. Smallwood, Amb. 676.

<sup>(</sup>s) Mitchelson v. Piper, supra. (t) Bethell v. Abraham, 17 Eq. 24.

a decree in an administration suit, without applying to the court to sanction his doing so.

2. Before judgment.—In Berry v. Gibbons (u), on the other hand, a decree had been made in a creditors' suit, for the administration of the personal estate of a testator, but no receiver had been appointed, nor any injunction granted to restrain the executrix from dealing with the assets. More than two years after the decree, the executrix, who was also the sole legatee, opened an account with a bank as such executrix. The account becoming overdrawn, she deposited with the bank a picture, belonging to the testator's estate, by way of security. It was contended, that although the bank had no notice of the suit, yet that it being a lis pendens, they ought to have searched the register. But Lord Justice James said: "In my opinion, the executrix had the legal right to make such a deposit. In order to deprive them (the bank) of the benefit of it, there must be evidence to show that they had notice of there being some breach of trust in the transaction. The doctrine of lis pendens has no bearing on the case; for a mere administration decree, no receiver having been appointed, nor any injunction granted to prevent the executrix from dealing with the assets, would not take away her legal powers."

3. Executor's right to prefer creditors.—So, where an executor or administrator, after the commencement of a creditor's administration action.

<sup>(</sup>u) 8 Ch. App. 747.

and before judgment, has voluntarily paid any creditor in full, he will be held to have made a good payment, and will be allowed it in passing his accounts, even though he may have had notice of the action before payment. To prevent such payments being made in any such case, the plaintiff should, immediately upon issuing his writ, apply for and obtain a receiver (x).

4. Powers of trustees who have paid money into court.—It may be conveniently mentioned here, that where trustees have paid the trust fund into court under the 42nd section of the Trustee Act, 1893 (which re-enacts the Trustee Relief Act), they can no longer exercise any of their powers, discretionary or otherwise. For the payment into court is, in effect, a retirement by the trustees from their office, and a relinquishment of the judgment and discretion confided to them by the settlor (y).

(y) Re Nettlefold, 59 L. T. 315.

<sup>(</sup>x) Re Radcliffe, European Ass. Society v. Radcliffe, 7 C. D. 733; and see also Re Barrett, Whitaker v. Barrett, 43 C. D. 70, where it was held that notwithstanding an order for an account, an executrix could still prefer a creditor, even although that creditor was herself as trustee of a settlement.

#### CHAPTER V.

#### Power of the Beneficiaries.

ART. 56. Power of the Beneficiaries in a Simple Trust.

,, 57. Power of the Beneficiaries collectively in a Special Trust.

,, 58. Power of one of several Beneficiaries in a Special Trust.

ART. 56.—Power of the Beneficiaries in a Simple

The beneficiary in a simple trust is entitled to have the legal estate vested in him or conveyed as he may  $\operatorname{direct}(a)$ .

ILLUST.—Thus, if property be devised unto and to the use of a trustee in fee simple, upon trust to pay testator's debts and, subject thereto, upon trust for testator's widow for life, and after her death upon trust for B. absolutely, B., on the death of the widow and the payment of the debts, will be entitled to call upon the trustee to vest

<sup>(</sup>a) Smith v. Wheeler, 1 Mod. 17; Brown v. How, Barn. 354; Att.-Gen. v. Gore, ibid. 150; Kaye v. Powell, 1 V. 408; and per Fry, J., Re Cotton's Trustees and London School Board, 19 C. D. 627.

the property absolutely in him. For in equity B. is the sole and absolute owner, and the court will not permit a person, solely and absolutely entitled, to be subjected to the tutelage or interference of a trustee. The court, in fact, regards a trustee as a kind of intermediary or stakeholder, whose office is to hold the scales evenly, and to see that the rights of several persons are mutually respected. But where there is only one person interested, the trustees' raison d'être ceases to exist, and consequently he himself becomes merely a person in the legal possession of another person's estate.

# Art. 57.—Power of the Beneficiaries collectively in a Special Trust.

- a. If there is only one beneficiary, or if there are several and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished.
- β. Infants, lunatics, and married women restrained from anticipation (b), are persons under disability. A married

<sup>(</sup>b) Stanley v. Stanley, 7 C. D. 589; Tullett v. Armstrong, 1 B. 22, even although the property was settled by her on herself; Arnold v. Woodhams, 16 Eq. 33.

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woman, even though not restrained from anticipation, cannot modify or extinguish a trust, without the joinder of her husband, and with the same formalities as would be required to release a corresponding legal estate, unless the trust is for her separate use (e), or unless her title first accrued or her marriage took place since 1882 (d).

ILLUST.—1. Vested interest at twenty-one, but payment deferred until twenty-four.—Thus, a testator gave his residuary personal estate to an infant, and directed his executors to place it out at interest to accumulate, and to pay the principal to the infant on his attaining twenty-four, and in the meantime to allow 60% a year for his maintenance; and the testator gave the residue over on the infant's dying under twenty-one. The court held that on the true construction of the will, the infant took an absolute vested and transmissible interest on attaining twenty-one; and that, consequently, being the only person beneficially interested, he could put an end to the trust, and was entitled to have the residue and accumulations

(c) Pride v. Bubb, 7 Ch. App. 64; Peacock v. Monk, 2 V. sen. 190; Taylor v. Meads, 34 L. J., Ch. 203.

<sup>(</sup>d) Married Women's Property Act, 1882. As to the meaning of her "title first accruing," see Reid v. Reid, 31 C. D. 402.

at once transferred to him (e). For, as the late Vice-Chancellor Page Wood said in the case of Gosling v. Gosling (f): "The principle of this court has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age, unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full, so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five, as to induce the court to hold that, as to the previous rents and profits, there has been an intestacy, the court does not hesitate to strike out of the will any direction that

<sup>(</sup>e) Josselyn v. Josselyn, 9 Sim. 63; Saunders v. Vautier, Cr. & Ph. 240; Harbin v. Masterman, W. N. 1893, p. 181. (f) Johns. 265, and see judgment of Malins, V.-C., Bubb v. Padwick, 13 C. D. 517. Fry, J., dissented from this case in Re Chaston (18 C. D. 218), but on grounds immaterial to the present point.

the devisees shall not enjoy it in full until they attain the age of twenty-five years."

- 2. Otherwise where intermediate interest does not go to same beneficiary.—The above cases must, however, be carefully distinguished from those in which the settlement gives the trustees a discretion to apply the income until the given age to the maintenance of a class of beneficiaries, or any one or more of them to the exclusion of the others. For, in that case, until the youngest member of the class attains the given age, it is impossible to say that any member of the class has an absolute right to the income of his share. Consequently, he is not the only person interested in his share, and cannot call for the payment of it (g).
- 3. Bequest of a sum of consols to purchase a life annuity.—Again, in Re Brown (h) there was a bequest of consols in trust to purchase a life annuity for a lady, to be held for her separate use without power of anticipation; and in case of her illness or incapacity, the testator gave the trustees a discretionary power as to the application of the annuity for her maintenance. The legatee being unmarried, and the restraint on anticipation being therefore nugatory, it was held that she was entitled to a transfer of the consols into her own name (i). A similar result follows where the

<sup>(</sup>g) Re Coleman, Henry v. Strong, 39 C. D. 443.

<sup>(</sup>y) Re Coleman, Heary V. Strong, 60 C. D. 115. (h) 27 B. 324. (i) See also Tullett v. Armstrong, 4 M. & C. 377; Buttanshaw v. Martin, Johns. 89; Wright v. Wright, 2 J. & H. 655; Cooke v. Fuller, 26 B. 99; Barton v. Briscoe, Jac. 603; Re Gaffee, 1 M. & G. 547; Re Linyee, 23 B. 241.

legatee, restrained from anticipating, becomes afterwards discovert (k), or is divorced, or about to be divorced (l), or has a protection order under 20 & 21 Vict. c. 85 (m), and à fortiori where she is judicially separated by a magistrate's order under 41 Vict. c. 19, s. 4.

- 4. Direction to purchase an annuity and attempted restraint on alienation.—A testatrix gave a sum of 20,000? stock, to be laid out by the trustees of her will in the purchase of a government annuity, in the name and for the benefit of her godson for the term of his natural life, and directed that the annuitant should not be entitled to have the value of his annuity in lieu thereof, and that if he should sell it, it should cease, and form part of her residuary estate. It was, nevertheless, held that the annuitant was absolutely entitled to the annuity, and that he could make a good title to it to a purchaser (n).
- 5. Absolute gift to daughters with direction to settle upon themselves at marriage.—So, where a testator directed his property to be divided into nine shares, and gave one and a half share to each of his two daughters, "to be settled on themselves at their marriage," it was held by Sir James Bacon, V.-C., that, on the true construction of the will (inasmuch as there was no reference to grandchildren, or any intimation of

<sup>(</sup>k) Buttanshaw v. Martin, supra.

<sup>(</sup>l) Re Linyee, supra. (m) Cooke v. Fuller, supra.

<sup>(</sup>n) Hunt-Foulston v. Furber, 3 C. D. 285.

the testator's desire to restrict the gift to a life interest), the daughters took absolutely, and if so, then under the above rule they were entitled to have their shares paid over to them on attaining twenty-one, free from all liability to have the same settled (o). Whether the learned judge's construction of the will was correct may perhaps be respectfully doubted (p). Anyhow, the reader must carefully distinguish the above case from those in which there is a direction to settle on a daughter and her issue (q), where of course she would not be the only person beneficially interested, and consequently would not be entitled to demand the capital.

6. Direction to sell estate and divide proceeds.— On similar principles, where an estate is directed to be sold and the proceeds to be divided amongst several persons, although no one singly can elect that his own share shall not be disposed of, but shall remain realty (r), yet if all the beneficiaries agree to take the land unconverted, they can put an end to the trust, and insist upon their right to do so (s). But until they do so elect the trust subsists. Where, however, there is no trust for sale, but merely a power of sale, the rule is subject

<sup>(</sup>o) Magrath v. Morehead, 12 Eq. 491.

<sup>(</sup>p) See Loch v. Bayley, 4 Eq. 122. (q) See, for example, Wise v. Piper, 13 C. D. 848. (r) Holloway v. Radcliffe, 23 B. 163; Biggs v. Peacock, 22 C. D. 284; Re Tweedie and Miles, 27 ibid. 315; and see judgment of Chitty, J., Re Daveron, Bowen v. Churchill, (1893) 3 Ch. at p. 424.

<sup>(</sup>s) Re Cotton's Trustees and London School Board, 19 C. D. 624; Harcourt v. Seymour, 2 Sim. N. S. 45; Cookson v. Reay, 5 B. 22; Dixon v. Gaufere, 17 B. 433.

to this modification, viz., that the trust still subsists, and the trustees can still exercise the power after the property has, under the trusts, become absolutely vested in persons who are sui juris, if, on the construction of the settlement, it appears to be the intention of the settlement, it should be then exercised, and provided that the power in its creation was not obnoxious to the rule against perpetuities (t). It is apprehended that it follows that, in such a case no one of the beneficiaries can insist upon having his undivided share in the legal estate conveyed to him by the trustees; for that would place it out of the trustees' power to exercise the power of sale confided to them for the benefit of all the beneficiaries.

7. Mortgagee of all the beneficial interests.—
The question is sometimes asked, whether a mortgagee of an only beneficiary, or, what comes to the same thing, of the several beneficial interests of all the beneficiaries, can put an end to a trust (say, for sale), and demand a conveyance of the legal estate from the trustees. It is, however, clear on principle that so long as any equity of redemption is in existence (that is to say, until sale or foreclosure) he could not. For while an equity of redemption subsists, the mortgagee is not the sole person beneficially interested in the property, and therefore cannot, under the rule above enunciated, assume absolute dominion over

<sup>(</sup>t) Re Cotton's Trustees and London School Board, 19 C. D. 624; Peters v. Lewes and East Grinstead Rail. Co., 18 ibid. 429; Re Lord Sudeley, (1894) 1 Ch. 334.

it. No doubt when he has obtained a decree of absolute forcelosure, he could put an end to the trust; and so, if he sold the entire beneficial interest of all the mortgages, could the purchaser. Moreover, if the mortgage, or all the mortgages (as the case may be), contained powers authorizing the mortgagee to stay, or agree with others in staying, the trust, he might, under such powers, do so; but nothing short of a most explicit power would enable him before foreclosure or sale to demand a conveyance of the legal estate (u).

Art. 58.—Power of one of several Beneficiaries partially interested in a Special Trust.

(1) The authority of one of several beneficiaries in a special trust in general depends upon the terms of the trust as construed by the court; but if sui juris, a beneficiary cannot be restrained from assigning his or her interest, save only in the case of a married woman, who may, by apt words in the settlement, be restrained from doing so

<sup>(</sup>u) See passim observations of Jessel, M.R., as to the rights of a mortgagee of distinct beneficial interests, Re Cooper and Allen, 4 C. D. 814.

during her coverture, but not before or afterwards (x).

(2) An equitable tenant for life of land within the meaning of the Settled Land Act, 1882, has all the powers of selling, enfranchising, exchanging, partitioning, leasing, mortgaging, &c. conferred on tenants for life by that act (y). And such person may prevent the trustees exercising their powers of the like character without his consent (z).

ILLUST.—1. When entitled to actual possession.
—In *Tidd* v. *Lister* (a), real and personal property was devised and bequeathed to trustees, upon trust to pay debts and funeral expenses, to keep the buildings on the real estate insured, to satisfy the premiums upon certain policies effected on the lives of the testator's sons, to allow each of his sons an annuity, and, subject thereto, in trust for his daughter for life, with divers remainders over. The personal estate sufficed to pay all but the

(a) 5 Mad. 429.

<sup>(</sup>x) Pybus v. Smith, 3 B. C. C. 340 n.; Re Ellis, 17 Eq. 409; Horlock v. Horlock, 2 D., M. & G. 644; Tullett v. Armstrong, 4 M. & C. 392; Re Gaffee, 1 M. & G. 547; Buttanshaw v. Martin, Johns. 89.

<sup>(</sup>y) 45 & 46 Vict. c. 38, s. 2, sub-s. 5, 58. The powers of tenants for life under this Act constitute so distinct and special a branch of law that no attempt is made to treat of them in this work.

<sup>(</sup>z) Ibid., sect. 56, sub-sect. 2.

insurance premiums, and the daughter, who was a feme covert, filed a bill praying to be let into possession, upon securing the amount of the premiums of the policies. Sir John Leach, however, refused her request on the ground that the testator had placed the direction of the property in the hands of the trustees, which was for the advantage of those who were to take in succession, and that a court of equity ought not to disappoint the testator's intention by delivering over the possession to the tenant for life, unprotected against her natural tendency to favour herself at the expense of those in remainder. "There may be cases in which it is plain, from the expressions in the will, that the testator did not intend the property should remain under the personal management of the trustees: there may be cases in which it is plain from the nature of the property that the testator could not mean to exclude the cestui que trust for life from the personal possession of the property; as in the case of a family residence. There may be very special cases in which the court would deliver the possession of the property to the cestui que trust for life, although the testator's intention appeared to be that it should remain with the trustees; as where the personal occupation of the trust property is beneficial to the cestuis que trusts, in which case the court, by taking means to secure the due protection of those in remainder, would, in substance, be performing the trust according to the intention of the testator."

2. Equitable interest of beneficiary cannot be made inalienable except during coverture.-The interest of a beneficiary (save only in the case of a married woman during her coverture) cannot be made inalienable (b), except by means of a shifting clause giving it over, or practically giving it over, to some other person upon alienation (c); in which case, the real interest of the beneficiary is merely contingent. The contingency upon which it ceases being an attempt at alienation, it follows that he has nothing to alien. But where he has an interest, and there is a mere restraint on alienation, without any new trust being raised by an attempt at alienation, the restraint is wholly nugatory. For instance, a trust to apply income for another's maintenance entitles him to have the income paid to him or to his alienee, even although he be restrained from alienation, for no one in remainder is injured by it (d). Where, however, there is a trust to pay income to A. until he shall alien or become bankrupt, &c., and, upon the happening of any of those events, a further trust to pay to him or apply for his benefit during the remainder of his life, the whole or so much only of such income as the trustees may in their discretion think fit,

 <sup>(</sup>b) Snowdon v. Dales, 6 Sim. 524; Green v. Spicer, 1 R.
 & M. 395; Brandon v. Robinson, 18 V. 429; Hood v. Oglander, 34 B. 513.

<sup>(</sup>c) See Oldham v. Oldham, 3 Eq. 404; Billson v. Crofts, 15 Eq. 314; Re Aylwin, 16 Eq. 585; Ex parte Eyston, 7 C. D. 145; and see Re Porter, Coulson v. Capper, (1892) 3 Ch. 481.

<sup>(</sup>d) Younghusband v. Gisborne, 1 Coll. 400.

and subject thereto, the residue of such income (if any) to be paid to other persons, then, as the trustees have an absolute discretion as to what part of the income they will apply for the benefit of the tenant for life, his alienees or creditors cannot force the trustees to pay them any part of the income (e). Moreover, it appears that although the trustees would not be justified in paying any part of the income to the life tenant (because it no longer belongs to him but to his alienees or creditors), they would nevertheless be justified in expending it for his benefit (f).

3. Restraint on alienation by married woman does not prevent her barring an entail.—Even where a married woman who is tenant in tail for her separate use is restrained from anticipation, she can bar the entail and turn her estate into a fee simple: for she does not thereby anticipate her interest, but only enlarges it. As was said by Sir G. Jessel, M. R., in Cooper v. Macdonald (g), "What is the meaning of the fetter? The meaning is exactly that which was expressed by the old common form of conveyancers, 'so as in nowise to deprive herself of the benefit thereof by way of anticipation.' The meaning was to give the actual enjoyment to the married woman for

(g) 7 C. D. 292.

<sup>(</sup>e) Re Bullock, Good v. Lickorish, 64 L. T. 736.

<sup>(</sup>f) Re Bullock, supra; and conf. Re Coleman, Henry v. Strong, 39 C. D. 443, and Re Neil, Hemming v. Neil, 62 L. T. 649.

her own benefit, not for the benefit of anybody else; and it is absurd, it appears to me, to extend such an equitable provision as this, so as to prevent a married woman enlarging the estate tail into an estate in fee simple for her own benefit. That is not an alienation so as to deprive herself of anything."

#### CHAPTER VI.

The Death, Retirement, or Removal of A Trustee, and the effect thereof in Relation to the Office of Trustee.

ART. 59. Survivorship of the Office and Estate.

- ,, 60. Devolution of the Office and Estate on the Death of Survivor.
- ,, 61. Retirement or Removal from the Office.

,, 62. Appointment of new Trustees.

- ,, 63. Vesting of Trust Property in new Trustees.
- ,, 64. Severance of Trust on Appointment of new Trustees.

ART. 59.—Survivorship of the Office and Estate.

Upon the death of a trustee, the office, as well as the estate, survives to the surviving trustees (a); and, notwithstanding that there is a power for the appointment of new trustees (b), the survivors can carry out the trust and exercise all such powers as are

(b) Warburton v. Sandys, supra; Doe v. Godwin, 1 D. & R. 259.

<sup>(</sup>a) Warburton v. Sandys, 14 Sim. 622; Eyre v. Countess of Shaftesbury, 2 P. W. 121—124.

necessary for that purpose (c), unless there be something in the settlement which specially manifests an intention to the contrary (d).

ILLUST. Sale by surviving trustee.—Thus, where there was a devise and bequest of freehold and other property, and all other the testator's real and personal estate to two persons, their executors and administrators, upon trust, by sale, to raise and invest a certain sum of money and apply the interest as therein directed, and one of the trustees died, and the other proceeded to sell the estate: it was held, on an objection to the title, that the surviving trustee might exercise the power of sale. The Vice-Chancellor said: "The argument proceeds, as it appears to me, on an entire disregard of the distinction between powers and trusts. No doubt where it is a naked power given to two persons, that will not survive to one of them unless there be express words or a necessary implication. . . . When, on the other hand, a testator gives his property, not to one party subject to a power in others, but to trustees upon special trusts. with a direction to carry his purposes into effect, it is the duty of the trustee to execute the trust.

(d) Foley v. Wartner, 2 J. & W. 245; and see Jacob v.

Lucas, 1 B. 436.

<sup>(</sup>c) Lane v. Debenham, 11 Ha. 188; Eyre v. Countess of Shaftesbury, supra; Re Cooke's Contract, 4 C. D. 454; and as to settlements coming into operation since 1881, see Trustee Act, 1893, sect. 22.

If an estate be devised to A. and B. upon trust to sell, and thereby raise such a sum, it is, I think, a novel argument, that after A.'s death B. cannot sell the estate and execute the trust" (e). And now, by the 22nd section of the Trustee Act, 1893, it is enacted, that where, in the case of a trust created after the 31st December, 1881, a power or trust is given to, or vested in, two or more trustees jointly, then, unless the contrary is expressed in the settlement (if any), the same may be exercised or performed by the survivor or survivors of them for the time being.

Art. 60.—Devolution of the Office and Estate on Death of the Survivor.

(1) Upon the death of a last surviving trustee, since the 31st December, 1881, the trust property (with the sole exception of copyhold property) devolves on his legal personal representative, and is incapable of being devised or bequeathed (f). Copyholds, however, devolve on the customary

<sup>(</sup>e) Lane v. Debenham, supra; and Re Cooke's Contract, supra.

<sup>(</sup>f) Conveyancing and Law of Property Act, 1881, s. 30. It is conceived that a last surviving trustee cannot evade this prohibition by appointing "special executors" for the purpose of executing the trust (see Re Parker, W. N. 1894, p. 14; Rose v. Bartlett, Cro. Car. 292; Clough v. Dixon, 10 Sim. 564).

heir, unless (semble) they are expressly devised.

- (2) Whether the person on whom the trust property devolves can exercise the powers and duties of the trustee, depends upon the language of the settlement, viz.
  - a. If it is to be collected from the settlement that the office was intended to be a personal one, it does not devolve on such person.
  - β. If, on the other hand, the office does not appear to have been intended by the settlor to be personal to the trustee (and particularly where the trust is directed to be performed by the trustee, his heirs, executors, &c.), it will devolve on such person.

Modern changes in the law as to the devolution of trust property.—Previously to 1874 the devolution of trust estates was regulated by the ordinary common law rules in relation to the devolution of property of a similar character, to which the trustee was beneficially entitled. Thus, trust personalty, or trust leaseholds, devolved upon the trustee's legal personal representatives; and trust real estate, devolved upon his heir, or passed to his devisce if he made a will which either expressly or impliedly passed the legal estate in such lands.

This state of the law was, however, amended, in a half-hearted way, by the 5th section of the Vendor and Purchaser Act, 1874, by which it was enacted, that upon the death of a bare trustee of any corporeal or incorporeal hereditament, the same should vest, like a chattel real, in his personal representatives. This section was, however, repealed, as from the 1st of January, 1876, and re-enacted in a form limited to cases of intestacy, by the Land Transfer Act, 1875, sect. 48. This latter section was in turn repealed by section 30 of the Conveyancing and Law of Property Act, 1881, by which estates of inheritance vested in any person solely by way of trust, were made to devolve (notwithstanding any testamentary disposition) on his personal representatives for the time being, as if the same were a chattel real. will be noted that this section was not confined (like the two prior acts) to bare trustees, but applied to all trustees. It was, however, soon doubted whether this section applied to copyholds, and as it was found that if it did so, manorial rights might be interfered with, it was enacted, by the 45th section of the Copyhold Act, 1887, that section 30 of the Conveyancing and Law of Property Act, 1881, should not apply to lands of copyhold or customary tenure vested in the tenant on the court rolls of any manor upon any trust. Consequently it is apprehended that where the trustee of copyholds is tenant on the court rolls of a manor, the legal estate devolves according to the old law before 1874, viz., upon his customary heir

if he died intestate, and on his devisee if he made a will containing a devise sufficiently broad to embrace such lands.

Summary of law as to devolution of trust real estate prior to and since 1881.—The net result of the legislation above referred to, seems to be as follows:—

- (1) If a trustee of real estate died before the 7th August, 1874, it descended to his heir-at-law, or customary heir.
- (2) If he died between the 7th August, 1874, and the 1st January, 1882, and was not a bare trustee (f), it descended to his heir-at-law, or customary heir.
- (3) If he died between the 7th August, 1874, and the 1st January, 1876, and was a bare trustee, then the trust property during that period was vested in his personal representatives; but unless they conveyed it during that period, it shifted to his heir-at-law or customary heir on the 1st January, 1876 (g).

<sup>(</sup>f) The statutory expression "bare trustee" has given rise to considerable difference of opinion. The late Sir George Jessel thought it meant a trustee who had no beneficial interest in the property, Morgan v. Swansea Board, 9 C. D. 582. On the other hand, the late V.-C. Hall, in Christie v. Ovington, 1 C. D. 279; V.-C. Bacon, in Re Docwra, 29 C. D. 693; and Mr. Justice Stirling, in Re Cunningham and Frayling, (1891) 2 Ch. 567, all considered that it meant a trustee with no duties except to convey the property to or by the direction of the cestuis que trust, and that a trust who also took a beneficial interest (ex. gr. as tenant in common) might be a bare trustee. It is considered that the latter view is the correct one.

<sup>(</sup>g) The extraordinary effect of sect. 48 of 38 & 39 Vict. c. 87 (Land Transfer Act, 1875), repealing 37 & 38 Vict.

(4) If he died between the 1st January, 1876, and the 1st January, 1882, and was a bare trustee, it devolved upon his personal representatives (h).

(5) If he died on or after the 1st January, 1882, and the property was freehold, it devolved (and still would devolve) upon his personal representatives, quite irrespective of whether he was or was not a bare trustee (i).

- (6) If he died between the 31st December, 1881, and the 16th September, 1887, and the trust property was of customary or copyhold tenure, it was during that period vested in his personal representatives; but unless they conveyed it during that period it shifted to his customary heir on the latter date (k).
- (7) If he died on or after the 16th September, 1887, and the trust property was of customary or copyhold tenure, it devolved (and still would devolve) on his customary heir (*l*).

Devise of trust estates.—As above stated, a sole or last surviving trustee who died on or before the 31st December, 1881, was empowered to devise or bequeath the legal estate in the trust property of whatever tenure or nature (m); and a trustee of

(i) 44 & 45 Vict. c. 41 (Conveyancing and Law of Property Act, 1881), s. 30.

(k) Copyhold Act, 1887, s. 45, as construed in *Re Mills*, 37 C. D. 312; 40 ibid. 14.

(m) Constructive trust estates (as land agreed to be

<sup>c. 78 (Vendor and Purchaser Act, 1874), s. 5, as construed by Hall, V.-C., in</sup> *Christie* v. *Ovington*, 1 C. D. 279.
(h) 38 & 39 Vict. c. 87, s. 48.

<sup>(</sup>l) Copyhold Act, 1887, s. 45; quære, whether this is so if he be a bare trustee, 40 C. D. 14.

customary or copyhold lands can (it is apprehended) still do so. Trust estates capable of being devised pass under a general devise or bequest unless the will contains expressions authorizing a narrower construction, or the disposition of the estate so devised or bequeathed be such as a testator would be unlikely to make of property not his own (n). Thus, where a testator subjected the property, passing under a general devise, to the payment of debts or legacies (o), or directed them to be sold (p), or devised them to persons as tenants in common (a), or to a numerous and unascertained class (r), or limited them in strict settlement, or in any other way which made it impossible to say the intention could be to give a dry trust estate, trust estates would not pass.

Party on whom trust estate devolves not necessarily able to execute the trust.—Whether, however, the person on whom the trust property devolves can exercise the duties and powers confided to the trustees by the settlement, depends on the intention of the settler as expressed in the settle-

(n) Braybrooke v. Inskip, 8 V. 436; Ex parte Morgan, 10 V. 101; Langford v. Angel, 4 Ha. 313.

sold) passed under a devise of trust estates (*Lysaght* v. *Edwards*, 2 C. D. 499); but see above-cited statute, sect. 4.

<sup>(</sup>o) Re Morley, 10 Ha. 293; Re Packman and Moss, 1 C. D. 214; Re Bellis's Trust, 5 C. D. 504; but see Brown v. Sibley, 24 W. R. 783, contra.

<sup>(</sup>p) Re Morley, supra.
(q) Martin v. Laverton, 9 Eq. 568.

<sup>(</sup>r) Re Finney, 3 Gif. 465; see also Re Packman and Moss, supra; and compare with Brown v. Sibley, supra.

ment, a proposition which will be best understood by a perusal of the illustrations given below.

ILLUST.—1. Trust confided to A. B. not performable by his representatives.—Thus, where the settlor gave personal property to A. B. upon trust "that the said A. B." do earry out certain specified objects, then upon the death of A. B., although the estate vested in his executor, the latter was unable to execute the trusts. For, as was said by Lord Cottenham in Mortimer v. Ireland (s), "whether the property is real or personal is no matter; for suppose a man appoints a trustee of real and personal estate simpliciter, adding nothing more, this cannot make his representative a trustee. . . . The property may vest in the representative, but that is quite another question from his being a trustee" (t).

2. Where representatives mentioned, seeus.—But where freeholds were vested in trustees, upon trust that "they or the survivor of them, or the heirs . . . of such survivor," should perform the trust, or where personal property was vested in trustees upon trust that they or the survivor of them or the executors or administrators of the survivor should perform the trust, then, upon the death of the survivor, the person on whom the trust estate

(s) 11 Jur. 721. But quære, see observations of Jessel, M.R., in *Re Osborne and Rowlett*, 13 C. D., at p. 789. (t) Of course his lordship's observation must not be

<sup>(</sup>t) Of course his lordship's observation must not be taken literally. The representative would clearly be a trustee, but not the trustee to execute the express trust.

devolved was able to execute the trust (u). I say the person on whom the estate devolved, because since the 31st December, 1881, freehold trust estates devolve on the trustees' personal representatives, and not upon his heir; and notwithstanding that the settlement has conferred the trust upon the trustee and his heirs, the office will devolve on his personal representatives. For, by sect. 30 of the Conveyancing and Law of Property Act, 1881, it is enacted, that for this purpose "the personal representatives for the time being of the deceased [trustee], shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers." This Act does not, however, extend to copyhold or customary estates (x).

3. Questionable whether devisee of trust estates could execute trust unless the settlement confided trust to trustee and his assigns.—As above stated, a trustee who died prior to the 1st January, 1882, could devise (and where it consists of copyhold or customary land, can still devise (y)) the estate, unless expressly, or by necessary implication, prohibited from doing so. Whether, however, a valid devise of the estate would confer on the devisee the right of executing the trust is very questionable, unless the settlement expressly confided the trust to the trustee or his assigns (z). At

<sup>(</sup>u) Re Burtt, 1 Dr. 319; Re Morton and Hallett, 15 C. D. 143; Re Cunningham and Frayling, (1891) 2 Ch. 567.

<sup>(</sup>x) Copyhold Act, 1887, s. 45. (y) Sect. 45 of Copyhold Act, 1887, semble. (z) Re Osborne and Rowlett, 13 C. D. 774; overruling

one time, owing to the decision of V.-C. Shadwell. in Cooke v. Crawford (a), it was considered that a devisee of a trust estate could only execute the trust if it was, by the settlement, confided to the trustee and his assigns; but that doctrine, after being repeatedly questioned, was energetically dissented from by the late Sir George Jessel, M.R., in the case of Re Osborne and Rowlett (b), where his Lordship, after elaborately showing its absurdity, and how often it had been questioned and doubted, and reviewing the whole of the authorities, said: "Therefore, looking at this state of things, we must consider Cooke v. Crawford overruled." His Lordship was of opinion, "that the person to execute the trust is the person who takes the estate, not by accident, so to speak, but in accordance with the provisions of the will [by which the trust was created]. There is a trust annexed to the estate, and when we find who is the person who takes the estate under the will, then we find who is the person to execute the trust." However, this decision of Sir George Jessel's was questioned by Lords Justices James and Baggallay in Re Morton and Hallett (c), where their Lordships said, that as at present advised, they were not prepared to dissent from Cooke v.

Cooke v. Crawford, 13 Sim. 91, and explaining Hall v. May, 3 K. & J. 585; Titley v. Wolstenholme, 7 B. 425; Saloway v. Strawbridge, 1 K. & J. 371.

<sup>(</sup>a) Supra. (b) Supra.

<sup>(</sup>c) 15 C. D. 143.

Crawford, or to concur in the opinion, expressed by Sir George Jessel, that it had been overruled. The law, therefore, on the point is in a far from satisfactory state. The point is not now of so much interest as it formerly was, inasmuch as, by the 30th section of the Conveyancing and Law of Property Act, 1881, trust estates (except those of copyhold and customary tenure, which have been taken out of that statute by the 45th section of the Copyhold Act, 1887), can no longer be devised; but the question may nevertheless, for some years to come, remain of importance in the investigation of titles to real estate.

## ART. 61.—Retirement or Removal of a Trustee.

- (1) A trustee can only retire
  - a. Under an express power;
  - β. Under the statutory power conferred by the Trustee Act, 1893, either on the appointment of a new trustee in his place, or, where there are more than two trustees, without such appointment if two remain;
  - 7. By the consent of the trustee and all the beneficiaries, which can

only be obtained where all are sui juris (d);

 $\delta$ . By order of the court (e).

- (2) A trustee may be removed from his office:
  - a. Under an express power;
  - β. Under the statutory power contained in the Trustee Act, 1893;
  - 7. By the court (f), at the instance of any of the beneficiaries, where he has behaved improperly (g), or is incapable of acting properly (h), or is a felon or dishonest misdemeanant, or a recent bankrupt (i), or is residing permanently, or for a long or indefinite period, abroad (j), or cannot be heard of (k).
- (3) The court can discharge an old

(e) Re Gregson, 34 C. D. 209.

(f) Under sect. 25 of the Trustee Act, 1893.

(g) Millard v. Eyre, 2 V. 94; Palairet v. Carew, 32 B. 567.

(i) Re Adams' Trust, 12 C. D. 634; Re Barker, 1 C. D.

<sup>(</sup>d) Wilkinson v. Parry, 4 Russ. 276; and see Art. 56, supra.

<sup>(</sup>h) Buchanan v. Hamilton, 5 V. 722; and Re Lemann, 22 C. D. 633; and Re Phelps, 31 C. D. 351, where trustees were incapable from old age and infirmity.

<sup>(</sup>j) Buchanan v. Hamilton, supra; Re Bignold, 7 Ch.
App. 223; and Re The Moravian Society, 26 B. 101.
(k) Re Harrison, 22 L. J., Ch. 69.

trustee without necessarily appointing a new one in his place, if it be difficult or impossible to do so (l). The costs of the application will come out of the estate if the trustee is justified in retiring (m), or where the removal is not caused by impropriety on his part.

ILLUST. What circumstances justify retirement of trustee.—In Forshaw v. Higginson (n) the late Master of the Rolls said: "It is quite settled that a trustee cannot from mere caprice retire from the performance of his trust, without paying the costs occasioned by that act; it is also quite clear, that any circumstances, arising in the administration of the trust, which have altered the nature of his duties, justify him in leaving it, and entitle him to receive his costs; but I think that to justify him in that course, the circumstances must be such as arise out of the administration of the trust, and not those relating to himself individually. If the circumstances preventing his continuing to perform his duties arose from any act of his own, or anything relating to himself, I think he ought to pay the costs of the appointment of a new trustee;

<sup>(1)</sup> Re Stokes, 13 Eq. 333.

<sup>(</sup>m) Coventry v. Coventry, 1 Kee. 758; Greenwood v. Wakeford, 1 B. 581; Forshaw v. Higginson, 20 B. 485; Re Stokes, supra; and see Barker v. Peile, 2 Dr. & S. 340.
(n) Supra. Re Bewerders Trust 1999 L.T. 1st 5. 9. 309

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but if the persons upon whom the appointment of a new trustee depends, absolutely refuse to take steps for that purpose, what is he to do? In my opinion, the only course he could take was to say what every trustee may say, 'I will apply to, and have the trust executed by the court, and I will ask to be discharged from the trusts as incidental to that relief.'"

Obs.—With reference to the circumstances which render a trustee unfit or incapable to act, the reader is referred to Art. 62, illust. 2.

ART. 62.—Appointment of New Trustees.

- (1) New trustees of a settlement may be appointed:
  - a. Under an express power.
  - β. Under the statutory power conferred by sect. 10 of the Trustee Act, 1893, unless a contrary intention is expressed in the settlement.
  - 7. By the court on the application of any trustee or beneficiary (0), whenever it is found inexpedient, difficult, or impracticable to appoint a trustee without the assistance of the court; and particularly where

<sup>(</sup>o) Trustee Act, 1893, s. 36, and Lunacy Act, 1890, s. 141. The court can charge the costs of such appointment and of vesting orders, on the trust estate (Trustee Act, 1893, s. 38.)

it is desirable to appoint a new trustee in place of one who is convicted of felony, or is a bankrupt (p). Where, however, there is a donee of a power of appointing new trustees able and willing to exercise it, the court has no power to appoint a trustee contrary to his wishes (q).

(2) On any appointment, unless expressly forbidden by the settlement, the number may be increased or diminished (r); but a retiring trustee will not be discharged by the appointment of a new trustee out of court, unless, on his retirement, there will be at least two trustees to perform the trust(s), or unless only one was originally appointed. The court rarely reduces the number, unless an administration action is pending, or the fund is about

<sup>(</sup>p) Trustee Act, 1893, s. 25.
(q) Re Higginbottom, (1892) 3 Ch. 132.
(r) Where the appointment is made under an express power, see Meinertzhager v. Davis, 1 Coll. 335; Miller v. Priddon, 1 D., M. & G. 335; Re Bathurst, 2 S. & G. 169. Where it is made under the statutory power, see Trustee Act, 1893, s. 10.

<sup>(</sup>s) Trustee Act, 1893, s. 10. This seems to modify the decision of Fry, J., in West of Eng. Bank v. Murch, 23 C. D. at p. 146.

to be paid into court, or is immediately divisible (t).

- (3) Every new trustee, both before and after the trust property is vested in him, has the same powers, authorities and discretions, and may in all respects act as if he had been an original trustee.
- (4) Any person who can hold property is capable of being appointed; but a person ought not to be appointed who is not sui juris; nor (except under very exceptional circumstances) one who resides out of the jurisdiction of the court; nor one who is a beneficiary, or husband of a beneficiary. The done of a power of appointing new trustees cannot appoint himself (u).

ILLUST.—1. Appointment of new trustees under express power.—Express powers to appoint new trustees are construed somewhat strictly. Thus, where an express power to appoint new trustees

(u) Skeats v. Allen, 37 W. R. 778; Škeats v. Evans, 42 C. D. 522.

<sup>(</sup>t) Re Gardiner, 33 C. D. 590; Davies v. Hodgson, 32 ibid. 225; Re Lambe, 28 ibid. 77; Re Harford, 13 ibid. 135; Re Martyn, 26 ibid. 745; Re Aston, 23 ibid. 217; Re Toutt, 26 ibid. 45; but see Re Fowler, W. N. (1886) p. 183, and Re Leon, (1892) 1 Ch. 348, where the Lunacy Court made an order vesting the trust estate in three of the original four trustees, the fourth having become lunatic.

is vested in "the surviving or continuing trustees or trustee, or the heirs, executors, or administrators of the last surviving and continuing trustee," and the two trustees are desirous of retiring, they cannot do so by appointing two new trustees in their place by one deed; but one must appoint a new trustee in the place of the first retiring trustee, and then the new trustee must appoint one in the place of the second retiring trustee (x). singular instance of verbal subtlety all turns upon the idea, that trustees who are about to retire cannot be said to be continuing (y), but that if one retired first, the other would be a continuing trustee, although he might intend to retire the next day. If, in addition to the words "surviving and continuing," the words "or other trustee or trustees" had been added, the two retiring trustees might have appointed two new ones by the same deed (x).

2. So, again, the words "unfit and incapable" are very strictly construed. Thus, where a new trustee was to be appointed if a trustee became

<sup>(</sup>x) Lord Camoys v. Best, 19 B. 414; Re Coates and Parsons, 34 C. D. 370; Re Norris, 27 C. D. 333. This notion was strongly disapproved by Bacon, V.-C., in Re Glenny and Hartley, 25 C. D. 611; but the V.-C.'s dicta were equally strongly disapproved by Pearson, J., in Re Norris, supra, and by North, J., in Re Coates and Parsons, supra.

<sup>(</sup>y) With regard to appointments made under the statutory power, this is not so, as the statute enacts that a continuing trustee shall include a refusing or retiring trustee, if willing to act, as donee of the power (Trustee Act, 1893, s. 10, sub-s. 4); but he is not a necessary party if unwilling to act (see Re Norris, Allen v. Norris, 27 C. D. 333).

incapable of acting, it was held that the bankruptcy of one of the trustees did not fulfil the condition, as it only rendered him unfit but not incapable (z). And so where the words were "unable to act," it was held that absence in China or Australia did not disable (a), although it clearly unfitted (b), a trustee for the office. On the other hand, it has been held that lunacy disables a trustee so as to bring a power into operation (c).

With regard to a trustee becoming unfit to act, bankruptcy (at all events where the trust property consists of money or other property capable of being misappropriated, and where the cestuis que trust desire his removal (d)), and liquidation or composition (d), or conviction of a dishonest crime (e), are grounds for his removal by the court under section 25 of the Trustee Act, 1873 (which has taken the place of section 147 of the Bankruptcy Act, 1883). Whether, however, they would enable a donee of a power of appointing new trustees to displace him hostilely on the ground of unfitness seems questionable. Anyhow, it has been held that infancy is not unfitness, although an infant will be removed by the court (f). Lastly, with

(a) Withington v. Withington, 16 Sim. 104; Re Harrison, 22 L. J., Ch. 69; but see Re Bignold, 7 Ch. App. 223.

<sup>(</sup>z) Turner v. Maule, 15 Jur. 761; see Re Watts, 9 Ha. 106.

<sup>(</sup>b) Mennard v. Welford, 1 Sm. & G. 426. A mere temporary absence abroad would not unfit a trustee for the office. Re Moravia Society, 4 Jur., N. S. 703.

<sup>(</sup>c) Re East, 8 Ch. App. 735.
(d) See Re Barker, 1 C. D. 43; Re Adams, 12 C. D. 634.
(e) Turner v. Maule, 15 Jur. 761.

<sup>(</sup>f) Re Tallatire, W. N. 1885, p. 191.

regard to *incapacity*, the word is strictly limited to incapacity of the trustee arising from some personal defect (g), as illness, lunacy (h), or, possibly, infancy.

- 3. Where the power is vested in a tenant for life he may exercise it even after alienating his life estate (i). On the other hand, where a decree for administration by the court has been made, the donee of a power (whether express or statutory) can only appoint a new trustee under the supervision of the court, which will, however, accept his nominee, unless there be strong grounds for rejecting him (k).
- 4. Appointment of new trustees under the statutory power.—If there be no express power, or even if there be one and the statutory power is not expressly negatived or modified, new trustees may be appointed under the provisions of section 10 of the Trustee Act, 1893, which is in the following words:—
- (1.) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating

<sup>(</sup>g) See Re Watts, 9 Ha. 106; Turner v. Maule, 15 Jur. 761; Re Bignold, 7 Ch. App. 223.

<sup>(</sup>h) Re East, 8 Ch. App. 735; Re Blake, W. N. 1887, p. 173.

<sup>(</sup>i) Hardaker v. Moorhouse, 26 C. D. 417.

<sup>(</sup>k) Re Gadd, Eastwood v. Clarke, 23 C. D. 134; Re Hall, Hall v. Hall, 33 W. R. 508.

the trust (l), or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee (m), may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid.

- (2.) On the appointment of a new trustee (n) for the whole or any part of trust property—
  - (a) the number of trustees may be increased; and
  - (b) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and
  - (c) it shall not be obligatory to appoint more than one

(n) This includes the executor of a sole trustee (Re Shafto, 29 C. D. 247), but not the executor of a person who was nominated trustee of a will but died before the testator. Nicholson v. Field, (1893) 2 Ch. 511; but cf. Re

Ambler, 59 L. T. 206.

<sup>(1)</sup> Where there was no express power but merely a declaration in a marriage settlement that the husband and wife and the survivor of them should have power to appoint new trustees, it was held that they could exercise this statutory power as the persons nominated for the purpose, &c. Re Walker and Hughes, 24 C. D. 698.

<sup>(</sup>n) These words govern the whole sub-section, so that the number of trustees cannot be increased unless there be a vacancy to be filled up. Re Gregson, 34 C. D. 209; Re Driver, 19 Eq. 352.

new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust; and

- (d) any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.
- (3.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.
- (4.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.
- (5.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.
- (6.) This section applies to trusts created either before or after the commencement of this Act.

This section (which is a re-enactment of sect. 31 of the Conveyancing and Law of Property Act, 1881) has put an end to many questions which formerly presented much difficulty. For instance, where a trustee had gone abroad, it was always a source of trouble to determine what amount of

absence constituted a disability or unfitness for his continuing a trustee (o). Now, however, twelve months is specified as the period. It will be seen that the power is exerciseable in six cases, viz.:— (1) on the death of a trustee, (2) where he remains out of the kingdom for twelve months, (3) where he desires to be discharged, (4) where he refuses to act, (5) where he is unfit to act, and (6) where he is incapable of acting. The first three cases require no comment. With regard to the case of a refusal to act, it is apprehended that it clearly extends to the case of a disclaimer—i.e., to a case where the person nominated trustee has never accepted the office (p). With regard to a trustee becoming unfit to act or incapable of acting, the reader is referred to illustration 2, supra.

Where there are joint donees of a power of appointment named in the settlement, and they differ as to the person to be appointed, they will be deemed to be "unable or unwilling" to appoint, so as to vest the statutory power in the surviving or continuing trustees (q). Lastly, it may be observed that the statutory power is not imperative, and imposes no obligation on the donee of the power to appoint new trustees (r); and by sect. 47 applies to trustees for purposes of the Settled Land Acts.

<sup>(</sup>o) See Re Harrison, 22 L. J., Ch. 69; Re Bignold, 7 Ch. App. 223.

<sup>(</sup>p) See Re Hadley, 5 De G. & Sm. 67.
(q) Re Sheppard, W. N. 1888, p. 234.
(r) Peacock v. Colling, 33 W. R. 528; Re Knight, 26
C. D. 82.

- 5. Appointment of new trustees by the court.—
  The power of the court to appoint new trustees is now contained in sect. 25 of the Trustee Act, 1893, which is as follows:—
- (1.) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt.
- (2.) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.
- (3.) Nothing in this section shall give power to appoint an executor or administrator.

And by sect. 37 of the same act, it is enacted that—

Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

It will be perceived that application should only be made to the court to appoint new trustees in cases where, from some reason or other, it is difficult, inexpedient, or impracticable to appoint them under an express power, or the statutory power; and if such an application (which is now made by summons in chambers (s)) be made unnecessarily, it will be dismissed with costs.

- 6. Illustrations of cases where application to court is proper.—However, there are many cases in which it is still impossible to appoint new trustees out of court. Thus, if a last surviving, or a sole trustee, die intestate, and leave no personal estate, so that no one can take out letters of administration to him, and no one is named in the settlement to appoint new trustees, it would be necessary to apply to the court. And so where a trustee has become, through old age and infirmity, incapable of acting in the trust, the court has exercised its jurisdiction of appointing new trustees (t).
- 7. Appointment by court where no original trustees.—Again, where, by inadvertence, or by reason of disclaimer, death or otherwise, there never were any original trustees of the settlement, and no express power of appointing any, the court will appoint some (u).
- 8. Appointment by court where trustee an infant.
  —So, where a trustee is an infant, the court will

<sup>(</sup>s) R. S. C. Ord. LV. r. 13a.

<sup>(</sup>t) Re Leman, 22 C. D. 633; Re Phelps, 31 C. D. 251. (u) Dodkin v. Brunt, 6 Eq. 580; D'Adhemar v. Bertrand, 35 B. 19; Re Smirthwaite, 11 Eq. 251; Re Davis, 12 Eq. 214; Re Moore, McAlpine v. Moore, 21 C. D. 778; Re Williams, 36 C. D. 231.

appoint another in his place; but this will be done without prejudice to any application by the infant, on coming of age, to be restored (x).

9. Appointment by court in cases of doubt .- So, if there is a doubt whether the statutory (or an express) power applies, the court will solve it by appointing new trustees itself (y).

10. Appointment by court where donee of power abroad.—So it has been held that where the power of appointing new trustees was given to a husband and wife jointly, and they were judicially separated, and the husband was living in Australia, it was a case in which it was "difficult or impracticable" to appoint new trustees, without the assistance of the court, so as to give the latter jurisdiction (z).

11. Power only exerciseable with consent of a lunatic.—It would seem that where the power of appointing new trustees is vested in a person who can only exercise it with the consent of a lunatic, the proper course is for the committee of the lunatic to apply to the Lords Justices, for leave to give the required consent on behalf of the lunatic (a). In the absence of other circumstances, therefore, the mere fact of a necessary consenting party being a lunatic, affords no ground for an application to the court to appoint new trustees.

<sup>(</sup>x) Re Shelmerdine, 33 L. J., Ch. 474.
(y) Re Woodgate, 5 W. R. 448.
(z) Re Somerset, W. N. 1887, p. 122.
(a) Re Garrod, 31 C. D. 164.

- 12. Appointment by court where trustee a felon or bankrupt.—Where a trustee is a felon, or a bankrupt, and refuses to join in the appointment of a new trustee in his place, the court can and will remove him, and appoint another person if the cestuis que trust desire it (b); and a similar observation applies to a trustee who has become a lunatic (c), or has gone to reside permanently abroad (d), or has absconded.
- 13. Summary procedure only applicable where trust is clear.—The regular procedure for the appointment of new trustees by the court under the statutory jurisdiction, is by originating summons; but it would seem that where the trust is not clear on the face of written documents (ex. gr., where a conveyance is taken in the name of some other person than the real purchaser (e)), the court first requires the trust to be established to its satisfaction, and that can only be done by an action.
- 14. Court will not re-appoint existing trustees.—
  It was at one time thought that where there were

<sup>(</sup>b) Coombes v. Brookes, 12 Eq. 61; Re Adams, 12 C. D.

<sup>634;</sup> Re Foster, 55 L. T. 499.

(c) If a vesting order is also required and the lunatic is "so found," the summons must be intituled not only in Chancery but also in lunacy (see Re Vickers, 3 C. D. 112; Re Mason, 10 Ch. App. 273), unless the lunatic is out of the jurisdiction. Re Gardiner, 10 C. D. 29.

(d) Re Bignold, 7 Ch. App. 223. As to the length of

<sup>(</sup>d) Re Bignold, 7 Ch. App. 223. As to the length of absence abroad, see Hutchinson v. Stephens, 5 Sim. 499. (e) Re Martin, W. N. 1886, p. 183; and see also Re Carpenter, Kay, 418; and Re Weeding, 4 Jur. N. S. 707.

properly appointed trustees in existence, and it was impossible otherwise to vest the trust property in them, or where it was desirable to remove one of several trustees and impossible to get anyone to serve in his place, the court could, in the one case, re-appoint all the existing trustees and order the trust property to vest in them; or, in the other case, re-appoint the continuing trustees in the place of themselves and the trustee whom it was desired to remove. However, it is now well settled that the court has no jurisdiction to reappoint existing trustees (f).

15. Court rarely reduces the number of trustees. —Where one of three trustees absconded, the court refused to re-appoint the two remaining ones and vest the estate in them alone (g). For, apart from the objection that the court had no jurisdiction to appoint existing trustees to be new trustees, it was said by North, J., to be a well-settled rule that the court will not reduce the number of trustees of a continuing trust, although it will deviate from that rule if the trustees have no duties to perform except to distribute a fund which is immediately divisible. On the other hand, in a subsequent ease (h), to that last cited

<sup>(</sup>f) Re Vicat, 33 C. D. 107; Re Dewhirst, ibid. 416; Re Gardner, ibid. 599; Re Batho, 39 ibid. 189; overruling Re Rathbone, 2 C. D. 483; Re Dalgleish, 4 ibid. 143; and Re Crowe, 14 ibid. 610.

<sup>(</sup>g) R<sub>P</sub> Gardiner, 33 C. D. 590, and cases cited in judgment of North, J.

<sup>(</sup>h) Re Fowler, W. N. 1886, p. 183.

(in which it was referred to), Chitty, J., appointed three new trustees in the place of four original ones, where it had been found impossible to obtain four. His lordship is reported to have said, "The court has power to appoint three new trustees in place of the original four, and if special circumstances are necessary for the exercise of this jurisdiction, the disclaimer of one of the four trustees, and the difficulty of getting new trustees, are special circumstances sufficient to justify the making of the order." Under these circumstances the practice on the point is not so well settled as could be wished.

16. Court can increase the number at any time.—Although the statutory power of increasing the number of trustees on an appointment out of court, can only be exercised when there is a vacancy to be filled up, yet there is no such limitation on the power of the court to increase the number of trustees at any time if it should be deemed expedient (i).

17. Appointing person to perform the duties incident to office of executor.—Although sect. 25, sub-sect. 3 of the Trustee Act, 1893, expressly prohibits the court from appointing an executor or administrator, yet where a testator has not appointed a trustee of trust legacies, and where, consequently, the trusteeship is incident to the office of executor, the court has jurisdiction on

<sup>(</sup>i) Re Gregson, 34 C. D. 209; and see Re Driver, 19. Eq. 352.

the death of the executor to appoint someone to perform those fiduciary duties (k).

18. General principles as to persons proper to be appointed new trustees.—In selecting persons to be new trustees, the Court acts upon the following principles, and it is apprehended that dones of powers *ought* to be guided by the same considerations, although, no doubt, their appointments would not be invalidated if they failed to observe them.

First, the Court will have regard to the wishes of the settlor as expressed in, or plainly deduced from, the settlement.

Secondly, the Court will not appoint a person with a view to the interest of some of the beneficiaries in opposition to the interest of others.

Thirdly, the Court will have regard to the question whether the appointment will promote or impede the execution of the trust; but (semble) the mere fact of a continuing trustee refusing to act with the proposed new trustee, will not be sufficient to induce the Court to refrain from appointing him (l).

19. Persons proper to be appointed new trustees.—With reference to the question as to the personal fitness of a proposed new trustee, an infant can, no doubt, be appointed an original trustee, but it would not be a wise appointment;

(1) Re Tempest, 1 Ch. App. 485.

<sup>(</sup>k) Re Moore, McAlpine v. Moore, 21 C. D. 778; and see Trustee Act, 1893, sect. 50 (interpretation of "Trust" and "Trustee.")

and a retiring trustee most certainly ought not to concur in the appointment of an infant to replace him. For an infant cannot properly carry out a special trust during his minority. As V.-C. Wood said, in King v. Bellord (m), "It is not in the power of a testator to confer upon an infant that discretion which the law does not give him, although he may make the infant his hand—his agent-to execute his purpose. He cannot give an estate to an infant, and say that he may sell it, when the law says that he cannot do so." An additional objection to making an infant a trustee consists in the fact that he cannot be made liable for a breach of trust arising from negligence (n), although he is liable to account on coming of age (o). He would seem to be liable for actual fraud if it can be shown that he had sufficient ability to contrive a fraud (p). For these reasons, therefore, an infant is not a proper person to be appointed, and a person who should appoint one might not improbably find that he would have to pay the costs of an action instituted for the purpose of removing the infant (q), as he cannot be supplanted as "unfit" by the appoint-

(q) See Raikes v. Raikes, 35 B. 403.

<sup>(</sup>m) 1 H. & M. 343; but consider Re Cardross, 7 C. D.

<sup>(</sup>n) Hindmarsh v. Southgate, 2 Russ. 324.
(o) Garnes v. Applin, 31 C. D. 147.
(p) Evroy v. Nicholas, 2 Eq. Ca. Ab. 489; Stikeman v. Dawson, 1 D. & S. 503; Wright v. Snowe, 2 ibid. 321; Davies v. Hodgosn, 25 B. 177.

ment of a new trustee under sect. 10 of the Trustee Act, 1893(r).

- 20. Appointment of tenant for life to be trustee. —A tenant for life has been held to be a not improper appointment (s); but it certainly is not an advisable one. For one of the main objects of a trustee is to protect the remainderman against the tenant for life.
- 21. Appointment of remainderman.—It has been held (t) that a remainderman is not a person whom the court will appoint, at all events where there is an infant tenant for life. For the interest of a person entitled in remainder is somewhat opposed to that of a tenant for life; and it would be for his advantage to lay out trust money in making improvements on the property, instead of making accumulations for the benefit of the tenant for life. Of course, however, such an objection would be inapplicable where a tenant for life is sui juris and consents to the appointment.
- 22. Appointment of solicitor to the trust.—The solicitor to the trust is not a proper person to be appointed a new trustee. Such an appointment would not, however, be bad, so as to invalidate the acts of the trustee so appointed; but the court would not make, or sanction, such an appointment (u).

<sup>(</sup>r) Re Tallatire, W. N. 1885, p. 191. (s) Forster v. Abraham, 17 Eq. 351. (t) Re Paine, 33 W. R. 564.

<sup>(</sup>u) Re Norris, 27 C. D. 333.

6. to a

- 23. Husband of beneficiary appointed trustee.— The husband of a beneficiary entitled for her separate use ought not to be appointed; for his interests are entirely in conflict with those of his wife. The court will never make such an appointment unless it is impossible to get another person, and even then will generally do so only upon condition that a direction is inserted in the order. stipulating that, upon his becoming sole trustee, there shall be another appointed (x). In a recent ease (y), Kay, J., appointed two persons, one of whom was a beneficiary, and the other the husband of a beneficiary, upon their both undertaking, if either were left sole trustee, to endeavour to obtain the appointment of a new trustee.
- 24. Person out of jurisdiction appointed trustee. —It is not proper to appoint a trustee who resides out of the jurisdiction, save under very exceptional circumstances (z). But where all the beneficiaries were resident in Australia, the court appointed a person resident there (a).
- 25. Appointing alien trustee.—An alien may, since the passing of the statute 33 & 34 Vict. c. 14, hold real estate, and may therefore (it is apprehended) be either a settlor or a trustee, although the court usually objects to appoint one unless he be permanently domiciled in England. Prior to

<sup>(</sup>x) Re Parrott, 30 W. R. 97.
(y) Re Lightbody, 33 W. R. 452.
(z) Re Curtis, 5 Eq. 422.
(a) Re Freeman, 37 C. D. 148; Re Lidiard, 14 C. D. 310; Re Cunard, 10 C. D. 29; Re Austen, 38 L. T. 601; Re Hill, W. N. 1874, p. 228.

that act he could purchase lands for an estate of freehold, but could not take them by operation of law, as, for instance, by descent or jure mariti (b). And even if he took them by purchase, he was liable to be ousted by the crown on inquisition found, and could not make a good title. Thus, in Fish v. Klein (c), a testator devised and bequeathed the residue of his real and personal estate to his wife and one Klein (an alien) upon trust to sell the same. The estate was sold for 60.000/.. but doubts having arisen as to Klein's capacity to convey the estate to a purchaser, the matter came before the court; and the then Master of the Rolls said: "The estate being out of Klein, it is impossible to consider his alienee in any better situation as to title than Klein himself." No doubt, however, the crown could have made a good title, and could have executed the trust (d); but there would seem to be no means of forcing the crown to execute a trust (e): although, it is apprehended, that practically, by means of a petition of right, the crown would be as amenable to the court in this matter as an individual.

26. Appointment of married woman as trustee.

—A married woman may undoubtedly be a trustee (f), but prior to the Married Women's

<sup>(</sup>b) Lew. 25.(c) 2 Mer. 431.

<sup>(</sup>d) Lew. 29.

<sup>(</sup>e) Paulett v. Att.-Gen., Hard. 467; Hodge v. Att.-Gen., 3 Y. & C. 342.

<sup>(</sup>f) Smith v. Smith, 21 B. 385.

Property Act, 1882, she was not a desirable person for the office. No doubt she could always exercise powers collateral, or in gross, or appendant (q); but she could only execute a trust to sell, unaccompanied by a power of appointment, with her husband's consent and joinder. For not only was he the party liable (h), but, as she took a mere legal estate, she took it subject to her legal disabilities and incidents (i). And it is apprehended, that even where there was a power vested in her to sell, she would not have been capable of entering into a binding contract to execute the power, as it was no question affecting her separate estate (k). However, it is conceived that, as, since the Married Women's Property Act, 1882, a married woman has the same proprietary rights and powers as a feme sole, the above objections have ceased to apply (1).

27. Appointment of a trust company.—Lastly, the court will not appoint (nor ought the donees of a power to appoint) an incorporated company formed for the purpose of acting as a trustee (m).

<sup>(</sup>g) Godolphin v. Godolphin, 1 V. sen. 21.

<sup>(</sup>h) Smith v. Smith, 21 B. 385; Bahin v. Hughes, 31 C. D. 390.

<sup>(</sup>i) Lew. 33.

<sup>(</sup>k) Avery v. Griffin, 6 Eq. 607.

<sup>(</sup>l) See Re Berkley, Berkley v. Berkley, 9 Ch. App. 720, where a spinster was appointed by the court; and see Married Women's Property Act, 1882, sects. 1, 18 and 24; and Re Hawksworth, W. N. 1887, p. 113.

<sup>(</sup>m) Re Brogden, Billing v. Brogden, W. N. 1888, p. 238.

\*ART. 63.—Vesting of Trust Property in new Trustees.

(1) On the retirement of a trustee, or the appointment of a new trustee out of court, everything requisite should be done for vesting the trust property jointly in the persons who are for the future to be the trustees (n). This may be done:—

a. By the ordinary modes of trans-

ferring property.

8. Since the 31st December, 1881, by a declaration in the deed by which he is appointed or by which he retires, to the effect that any estate or interest in any land, or in any chattels, or the right to recover and receive any chose in action, subject to the trust, shall vest in the persons who, by virtue of the deed, become and are the trustees. Such a declaration does not, however, transfer the legal estate or right in (1) copyholds or customary lands, (2) lands held by way of mortgage, or (3) shares, stocks,

<sup>(</sup>n) Trustee Act, 1893, s. 10, sub-s. 2 (d), and s. 11, sub-s. 2.

annuities or property only transferable in the books kept by a company or other body, or in manner prescribed by or under act of parliament (o).

y. Where none of the foregoing means are feasible, application may be made, by summons to a judge of the Chancery Division of the High Court of Justice (or, in case of lunacy or unsoundness of mind of a trustee who is being displaced, to the Lord Chancellor or Lords Justices), for a vesting order (p).

(2) On the appointment of a new trustee by the court, a vesting order will be made, vesting the trust property in the new trustee or trustees, either alone, or jointly with the continuing trustee or trustees, as the case may require.

<sup>(</sup>o) Trustee Act, 1893, s. 12. (p) Trustee Act, 1893, ss. 26, 32, 34, 35, and 36; and as to lunatic trustees, or trustees of unsound mind, Lunacy Act, 1890, ss. 133—143. The court cannot, however, under this act make a vesting order where the legal estate in the entirety, and the beneficial interest in part of land, is vested in the Crown. In such a case the proper procedure is to issue a summons asking for a sale under sect. 5 of the Intestates' Estates Act, 1884. Re Pratt, 55 L. T. 313.

Obs. 1. Vesting declarations on appointments out of court.—Before the year 1882, difficulties used frequently to arise in relation to the vesting of the trust property on the appointment of new trustees, owing to the fact that the legal estate could only be transferred by the persons in whom it was legally vested, or by a vesting order of the court. For instance, a trustee might leave the country permanently, or become a lunatic, or (being a sole trustee) die intestate and without any heir. The legal estate being vested in him, could only be got out of him by a duly executed conveyance or assignment, or by an order of the court; and as the former could not be obtained, the latter became a matter of necessity. However, by sect. 34 of the Conveyancing and Law of Property Act, 1881, re-enacted by sect. 12 of the Trustee Act, 1893, this difficulty was to a great extent obviated, although not completely; for it does not apply to all kinds of property, so that applications to the court for vesting orders will still have to be made in many cases.

The section in question is in the following words, viz.:—

(1) Where a deed by which a new trustee is appointed to perform any trust, contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those

persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

- (2) Where a deed by which a retiring trustee is discharged under this act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.
- (3) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.
- (4) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this act.
- (5) This section applies only to deeds executed after the31st of December, 1881.

It will be perceived that the declaration must be contained in the deed by which the new trustee is appointed. With regard to property which does not pass by a vesting declaration, copyholds must be vested by surrender and admittance, in the usual way. Mortgages are invariably transferred without disclosing the trust, so as to keep it off the face of the mortgagor's title. Stocks, shares, &c., are transferred by deed of transfer, duly registered with the bank or company.

## 2. Vesting orders made by the Chancery Division

26. In any of the following cases, namely:-

(i.) Where the High Court appoints or has appointed a new trustee (r); and

(ii.) Where a trustee (s) entitled to or possessed of any land (t), or entitled to a contingent right therein,

(q) By sect. 41 of the Trustee Act, 1893, this jurisdiction extends to land and personal estate in Her Majesty's dominions, except Scotland. See Re Hewitt, 6 W. R. 537, and Re Lamotte, 4 C. D. 325. It is proposed to give similar powers to the Irish Courts by the Trustee Act, 1893, Amendment Bill, 1894.

(r) It is apprehended that the intention of the legislature was that each of these paragraphs should stand alone, and that the circumstances enumerated in each should give jurisdiction to make a vesting order. That was so under the Trustee Act, 1850, and the court made vesting orders on the appointment of new trustees, even though there was no incapacity in the person in whom the estate was vested to convey it to the new trustees. Re Manning, Kay, App. xxviii.; Hancox v. Spittle, 3 Sn. & Giff. 478. However, in the new section, the language is not very happy, as if we read paragraph (i), and omit paragraphs (ii) to (vi), there is nothing to show to what the words "the land," which is to be vested, refer.

(s) The word "trustee" includes a constructive trustee, ex. gr., the heir of a testator whose trustees have predeceased him or disclaimed. Wilkes v. Groom, 6 D., M. & G. 205; and see Trustee Act, 1893, s. 50.

(t) It is apprehended that "land" includes leaseholds; for it was stated in the memorandum annexed to the bill that the words "entitled to or possessed of" were substituted for the words "seised or possessed of," which were used in the Act of 1850, for the express purpose of

either solely or jointly (u) with any other person,—

(a) is an infant (v), or

- (b) is out of the jurisdiction of the High Court(x),
- (c) cannot be found; and
- (iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; and
- (iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead; and
- (v.) Where there is no heir or personal representative to a trustee (y) who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; and

including leaseholds. See also sect. 50, where land is defined as including land of any tenure. The matter might, however, with advantage, have been made plainer. Under the old act there was no power to vest leaseholds, except on the appointment of new trustees by the court. The corresponding section of the Lunaey Act, 1890, contains the old words "seised or possessed," and consequently it seems questionable whether the lunacy judges have power to make vesting orders of leaseholds. As to whether the court has jurisdiction to vest the right to the

title deeds, see De Sayres v. De Sayres, 87 L. T. Notes, 93.

(u) The word "jointly" is not to be construed strictly. It includes coparceners. Re Greenwood, 27 C. D. 359.

(v) Even if the infant be also a lunatic, this gives the

Chancery Division jurisdiction. See Lunacy Act, 1890, s. 143.

(x) A merely temporary absence (ex. gr., that of a sailor)on a voyage) is not sufficient. Hutchinson v. Stephens, 5 Sim. 499. On the other hand, where a person out of the jurisdiction is a lunatic, this paragraph gives to the Chancery Division a jurisdiction which in the case of a lunatic in England would be only exerciseable by the lunacy judges. Re Gardner, 10 C. D. 29.
(y) See Re Williams, 56 L. T. 884; Re Rackstraw,
52 ibid. 612; Re Pilling, 26 C. D. 432.

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(vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully (z) refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement;

the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate(a) as the court may direct, or releasing or disposing of the contingent right to such person as the court may direct.

Provided that-

- (a.) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the court may direct in the persons who on the appointment are the trustees; and
- (b.) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person.
- 32. A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a new trustee, have the same effect

<sup>(</sup>z) A trustee's conduct in not conveying cannot be considered wilful, if the title of the applicant to call for a conveyance is subject to a dispute which leads the trustee to entertain a bonâ fide doubt as to his title. Re Mills, 40 C. D. 14.

<sup>(</sup>a) Under these words the court can vest the estate of a tenant in tail in a purchaser in fee simple, but it usually appoints some person to execute a regular disentailing assurance under sect. 33. See Caswell v. Sheen, W. N. 1893, p. 187; and Powell v. Matthews, 1 Jur. N. S. 973; Mason v. Mason, W. N. 1878, p. 41.

as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity, and had duly executed all proper conveyances of the land for such estate as the court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

33. In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

34. (1.) Where an order vesting copyhold land (b) in any person is made under this act with the consent of the lord or lady of the manor, the land shall vest accordingly without surrender or admittance.

(2.) Where an order is made under this act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land; and the lord and lady of the manor and every other person shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done those assurances and things.

<sup>(</sup>b) As to what fines are payable, see Paterson v. Paterson, 2 Eq. 31; and Hall v. Bromley, 35 C. D. 642.

35. (1.) In any of the following cases, namely:-

(i.) Where the High Court appoints or has appointed a new trustee; and

(ii.) Where a trustee entitled alone or jointly with another person to stock(c) or to a chose in action—

(a) is an infant, or

(b) is out of the jurisdiction of the High Court (d), or

(c) cannot be found; or

- (d) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled, or
- (e) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him; or

(iii.) Where it is uncertain whether a trustee entitled

(d) See note (x), supra, p. 503. Where one trustee was a lunatic and the other out of the jurisdiction, and two new ones had been appointed under a power, the Court of Appeal, acting in lunacy, vested the stock in the one out of the jurisdiction, and then, acting under their chancery jurisdiction, it appearing that he was out of the jurisdiction, vested it in the new trustees. Re Batho, 39

C. D. 189.

<sup>(</sup>c) Stock includes fully paid-up shares, and any fund, annuity or security transferable in books kept by any company or society, or by instrument of transfer, either alone or accompanied by other formalities, and any share or interest therein. Sect. 50. Under the repealed Act of 1850, stock includes shares not fully paid-up (Re New Zealand, &c. Co., (1893) 1 Ch. 403); but query whether the above definition would admit of such a construction being given to the new act. As to orders under Lunacy Act, see Re Gregson, (1893) 3 Ch. 233.

alone or jointly with another person to stock or to a chose in action is alive or dead(e),

the High Court may make an order vesting the right to transfer (f) or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the court may appoint:

Provided that-

- (a) Where the order is consequential on the appointment by the court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees; and
- (b) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the court may appoint.
- (2.) In all cases where a vesting order can be made under this section, the court may, if it is more convenient,

(f) Where the trust funds are invested in unauthorised stocks, the order will give the new trustees, or purchasers from them, the right to call for a transfer, &c. Re Peacock,

14 C. D. 212.

<sup>(</sup>e) It will be perceived that, except where the court is appointing new trustees, it has no jurisdiction to make a vesting order of stock where the last surviving or only trustee has died without leaving a legal personal representative. At one time (as also in the case of leaseholds) the court used to get over this difficulty by re-appointing trustees already appointed out of court, and by making a vesting order consequential on such re-appointment. Re Rathbone, 2 C. D. 483; Re Dalgleish, 4 C. D. 143; Re Crowe (No. 2), 14 C. D. 610. However, it is now well settled that the court has no jurisdiction to re-appoint trustees who are already validly appointed. Re Vicat, 33 C. D. 103; Re Dewhirst, ibid. 416; Re Gardner, ibid. 590; Re Batho, 39 C. D. 189. Consequently, the former device is no longer available, and a legal personal representative has to be constituted in such cases.

appoint some proper person to make or join in making the transfer.

- (3.) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the court under this act, may transfer the stock to himself or any other person, according to the order, and the Banks of England and Ireland and all other companies shall obey every order under this section according to its tenor.
- (4.) After notice in writing of an order under this section it shall not be lawful for the Bank of England or of Ireland or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.
- (5.) The High Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this act is to be exercised.
- (6.) The provisions of this act as to vesting orders shall apply to shares in ships registered under the acts relating to merchant shipping as if they were stock.
- 36. (1.) An order under this act for the appointment of a new trustee or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested (g) in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.
- (2.) An order under this act concerning any land, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

<sup>(</sup>g) This includes a person contingently interested (Re Sheppard, 4 D., F. & J. 423), but not the committee of a lunatic beneficiary. Re Bourke, 2 D., J. & S. 426.

- 3. Vesting orders made by the lunacy judges (h).—With regard to vesting orders of property held by trustees who are lunatics or persons of unsound mind, the Lunacy Act, 1890, contains the following enactments, viz.:—
- 135. (1.) When a lunatic (i) is solely or jointly seised or possessed of any land upon trust or by way of mortgage, the judge in lunacy may, by order, vest such land in such person or persons (k), for such estate, and in such manner as he directs.
- (2.) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the judge may, by order, release such trustees from the contingent right, and dispose of the same to such person or persons as the judge directs.
- (3.) An order under sub-sects. (1) and (2) shall have the same effect as if the trustee or mortgagee had been

(h) As to what applications must be made in chancery, and what in lunacy, and what in both lunacy and chancery, the reader is referred to "The Annual Practice," notes to Ord. 16, r. 17, where the result of the cases is summarised.

(i) This word includes lunatics not so found (sect. 341). As to what the word comprises, see Re Martin, 34 C. D. 618, and Re Barber, 39 C. D. 187, and conf. Re Dewhirst, 33 C. D. 416. If the lunacy is disputed, the lunacy judges have no jurisdiction to make a vesting order. See Re Combs. 51 L. T. 45; Re Phillips, Cr. & Ph. 147.

(k) The court will not vest the property in a beneficiary who is absolutely entitled, but will appoint a new trustee. Re Holland, 16 C. D. 672; conf. Re Godfrey, 23 ibid. 205; and Re Currie, 10 C. D. 93. Where one of several trustees becomes insane, the court will not vest the property in the remaining trustees, even if it has jurisdiction to do so, but a new trustee must first be appointed (Re Nash, 16 C. D. 503), unless the fund is immediately divisible. Re Watson, 19 C. D. 384, and Re Toutt, 26 C. D. 745.

sane, and had executed a deed conveying the lands for the estate named in the order, or releasing or disposing of the contingent right.

- (4.) In all cases where an order can be made under this section, the judge may, if it is more convenient, appoint a 'person to convey the land, or release the contingent right, and a conveyance or release by such person in conformity with the order, shall have the same effect as an order under sub-sects. (1) and (2).
- (5.) Where an order under this section, vesting any copyhold land in any person or persons, is made with the consent of the lord or lady of the manor, such land shall vest accordingly, without surrender or admittance.
- (6.) Where an order is made appointing any person or persons to convey any copyhold land, such person or persons shall execute and do all assurances and things for completing the assurance of the lands; and the lord and lady of the manor shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability, and had executed and done such assurances and things.
- 136. (1.) Where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the judge in lunacy may, by order vest in any person or persons the right to transfer or call for a transfer of the stock, or to receive the dividend thereof, or to sue for the chose in action.
- (2.) In the case of any person or persons jointly entitled with a lunatic to any stock or chose in action upon trust or by way of mortgage, the judge may make an order vesting the right to transfer, or call for a transfer, of the stock, or to receive the dividends thereof, or to sue for the chose in action, either in such person or persons alone, or jointly with any other person or persons.
- (3.) When any stock is standing in the name of a deceased person whose personal representative is a lunatic,

or when a chose in action is vested in a lunatic as the personal representative of a deceased person, the judge may make an order vesting the right to transfer, or call for a transfer, of the stock, or to receive the dividends thereof, or to sue for the chose in action, in any person or persons he may appoint.

(4.) In all cases where an order can be made under this section, the judge may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(5.) The person or persons in whom the right to transfer, or call for a transfer, of any stock, is vested, may execute and do all powers of attorney, assurances and things to complete the transfer to himself or themselves or any other person or persons, according to the order; and the bank, and all other companies and their officers, and all other persons, shall be bound to obey every order under this section according to its tenor.

(6.) After notice in writing of an order under this section, it shall not be lawful for the bank or any other company, to transfer any stock to which the order relates, or to pay any dividends thereon, except in accordance

with the order.

## ART. 64.—Severance of Trust on Appointment of new Trustees.

"A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing

trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the firstmentioned part (l).

ILLUST.—Explanatory example.—Thus, if a testator gives real and personal estate to trustees, upon trust to pay the income to A. during her life, and after her death to sell and divide the proceeds into two parts, and to hold one of such parts in trust for A.'s daughter Mary, for life, with remainder for her children, and the other of such parts in trust for A.'s daughter Ann, for life, with remainder to her children, then upon the death of A., and the appointment of new trustees, separate sets of trustees may now be appointed to administer the trusts of Mary's and Ann's respective shares. It would seem that, prior to the 31st December, 1882, this could not have been done, except by the court (m). The section applies notwithstanding that the trusts, although separate for a time, may ultimately again unite in favour of one individual (n).

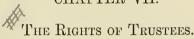
(m) Cooper v. Todd, 29 W. R. 502. The court, however, could do it. See Re Cunard, 27 W. R. 52; Re Moss, 37

C. D. 513.

<sup>(</sup>l) Trustee Act, 1893, s. 10, re-enacting Conveyancing Act, 1882, s. 5, as amended by Conveyancing Act, 1892, s. 6, by which the decision of North, J., in Savile v. Couper, 35 W. R. 829, was overruled.

<sup>(</sup>n) Re Hetherington, 34 C. D. 211.

## CHAPTER VII.



ART. 65. Right to Reimbursement and Indemnity.

- 66. Right to Discharge.
- 67. Right to take Direction of a Judge.
- 68. Right to pay Trust Funds into Court under certain Circumstances.
- 69. Right under certain Circumstances to have the Trust administered by the Court.

## ART. 65.—Right to Reimbursement and Indemnity.

(1) A trustee is entitled to be reimbursed out of the trust property (a) all expenses which he has properly paid or incurred in the execution of the trust (b). And where a trustee accepts the trust at the request of one who is a beneficiary, the latter is, as a general rule, personally liable to indemnify the trustee (c).

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<sup>(</sup>a) Re Earl of Winchilsea, 39 C. D. 168.
(b) Trustee Act, 1893, s. 24; Worral v. Harford, 8 V. 8; Morrison v. Morrison, 4 K. & J. 458; Re German Mining Co., 4 D., M. & G. 19.

<sup>(</sup>c) Jervis v. Wolferstan, 18 Eq. at p. 24, said to be perhaps too broadly stated by Lord Blackburn, in Fraser

- (2) Although, as between the beneficiaries, such expenses are generally payable out of capital (d), yet, until they are paid, the trustee has a lien for them, on both capital and income (e), in priority to the claims of the beneficiaries (f).
- (3) The question as to what expenses are, and what are not, properly incurred, depends upon the circumstances of each particular case (g).
- (4) Where a trustee has committed a breach of trust, he will not be allowed to reimburse himself his expenses until he has made good the breach (h).

ILLUST.—1. Damages recovered by third parties. -In Bennett v. Wyndham (i), a trustee, in the due execution of his trust, directed a bailiff, employed on the trust property, to have certain trees felled. The bailiff ordered the wood-cutters usually

v. Murdoch, 6 App. Cas. at p. 872; and see also Re German Mining Co., 4 D., M. & G. 19, 54; and Hobbs v. Wayet, 36 C. D. 256.

<sup>(</sup>d) Carter v. Seabright, 26 B. 376.

<sup>(</sup>e) Stott v. Milne, 25 C. D. 710; Ex parte James, 1 D. & C. 272; Ex parte Chippendale, 4 D., M. & G. 19; and see Walters v. Woodbridge, 7 C. D. 504.

(f) Dodds v. Tuke, 25 C. D. 617; Matthias v. Matthias,

<sup>3</sup> Sm. & Giff. 552.

<sup>(</sup>g) Leedham v. Chawner, 4 K. & J. 458.

<sup>(</sup>h) Re Knott, Bax v. Palmer, 56 L. J., Ch. 318.

<sup>(</sup>i) 4 D., F. & J. 259.

employed on the property to fell the trees, in doing which they negligently allowed a bough to fall on to a passer-by, who, being injured, recovered heavy damages from the trustee in a court of law. These damages were, however, allowed to the trustee out of the trust property.

2. Calls on shares.—So where a trustee of shares has been obliged to pay calls upon them, he is entitled to be reimbursed (k); and the right to be indemnified accrues directly the liability is proved to exist. Thus, where certain moneys belonging to A. were invested in shares in a banking company, in the joint names of A. and B., of whom B. was the survivor, and eventually the company was wound up, and it was proved that calls would be made on the estate of B., it was held that B.'s executor was entitled forthwith to bring an action for a declaration of his right to indemnity against the representatives of A., before any call was actually made (1). However, there must be some proof that the liability is not merely imaginary; for a person entitled to be indemnified cannot sue quia timet, or, in other words, he cannot claim a declaration of his right to indemnity before the contingency which creates the damage has

<sup>(</sup>k) James v. May, 6 H. L. 328; Re National Finance Co., 3 Ch. App. 791; Fraser v. Murdoch, 6 App. Cas. 855; see also, as to right of executor to recover calls from a residuary legatee, Re Kershaw, Whitaker v. Kershaw, 45 C. D. 320.

<sup>(1)</sup> Hobbs v. Wayet, 36 C. D. 256.

e. Com

arisen (m). Therefore, although a trustee may, as such, be a member of a company which is being wound up, he cannot bring an action to establish his right to an indemnity, unless he can establish the fact that calls must be made (m).

3. Indemnity for liabilities incurred in carrying on trust business.—So where trustees or executors have rightly carried on a business in accordance with the provisions of a will or settlement, they are entitled to be indemnified out of the trust estate against any liabilities which they have properly incurred (n). And this right will prevail even against creditors of the testator himself if they have assented to the business being carried on in the interest as well of themselves as of the beneficiaries under the will (n). But where the settlement has directed a trustee to employ a specific portion only of the estate for the purpose of carrying on the business, the rule is, that, although the trustee is personally liable to creditors for debts incurred by him in carrying on the trade pursuant to the settlement, his right to indemnity is limited to the specific assets so directed to be employed (o). The creditors of a trust business have no original right to claim payment of their debts out of the trust estate (p). Their remedy is

<sup>(</sup>m) Hughes-Hallett v. Indian Mammoth Gold Mines Co., 22 C. D. 561.

<sup>(</sup>n) Dowse v. Gorton, (1891) App. Cas. 190; Re Evans, Evans v. Evans, 34 C. D. 597.

<sup>(</sup>o) Re Johnson, Shearman v. Robinson, 15 C. D. 548; Re Webb, 63 L. T. 545.

<sup>(</sup>p) Ibid.

against the trustee whom they trusted; but they have also a right to be put in his place against the trust estate (q). If, therefore, the trustee is (by reason of breach of trust or otherwise) himself indebted to the trust estate to an extent exceeding his claim to indemnity, then, inasmuch as he cannot be entitled to an indemnity except upon the terms of making good his own indebtedness to the trust, the creditors are in no better position, and can have no claim against the estate (r).

4. Solicitor's costs.—A trustee or executor will be allowed the amount of a solicitor's bill of costs which he has paid for services rendered in the matter of the trust (s); even, it would seem, where the necessity for the services arose through want of caution on the part of the trustee: ex. qr., where proceedings had to be taken by an administrator against an agent to whom he had entrusted moneys to make payments (t). However, under the Solicitors Act (6 & 7 Vict. c. 73, s. 39), beneficiaries may, at the discretion of the court, obtain an order to tax the costs of the trustee's solicitor. Even before that act, if the trustee paid the solicitor's bill without taxation, the beneficiaries

<sup>(</sup>q) Re Johnson, Shearman v. Robinson, 15 C. D. 548; Re Webb, 63 L. T. 545; Strickland v. Symons, 26 C. D. 245; and see also Redman v. Rymer, 60 L. T. 385; and Lady Wenlock v. River Dee Commissioners, 19 Q. B. D. 155.

<sup>(</sup>r) Re Johnson, supra; Exp. Garland, 10 Ves. 110; recognized in Re Blundell, Blundell v. Blundell, 44 C. D. at p. 11.

<sup>(</sup>s) Macnamara v. Jones, Dick. 587.

<sup>(</sup>t) Re Davis, Muckalt v. Davis, W. N. 1887, p. 186, sed quære.

had a right to have the bill referred to a master "to be moderated;" and if, on such reference, the charges were reduced, they were disallowed the trustee, and he was left to get them back, if he could, from the solicitor (u).

5. Costs of administration suit, together with "costs, charges, and expenses."—Unless trustees have been guilty of misconduct, they are entitled to their costs of an action for the administration of the trust as between solicitor and client, and not merely as between party and party (v), and, in addition thereto, any other costs, charges, and expenses properly incurred by them in the execution of the trust. To deprive a trustee of his costs, charges, and expenses, has been called "a violent exercise" of the court's discretion. A trustee can only be deprived of them for gross misconduct(w); and, contrary to the usual rule of the court, an order depriving a trustee of costs, or limiting him to a particular fund, is appealable by him on that ground (x), although, if he be allowed costs, the beneficiaries cannot appeal against such allowance (y). If trustees are co-plaintiffs or codefendants, they ought, except under special circumstances, to sue or defend jointly (z), and will

<sup>(</sup>u) Johnson v. Telford, 3 Russ. 477; Langford v. Mahoney, 4 Dr. & War. 110.

<sup>(</sup>v) Re Love, Hill v. Spurgeon, 29 C. D. 348.

<sup>(</sup>w) Birks v. Micklethwait, 34 L. J., Ch. 364.
(x) See Re Chennell, Jones v. Chennell, 8 C. D. 492; Re Love, Hill v. Spurgeon, 29 C. D. 348; Re Knight, 26 C. D. 82.

<sup>(</sup>y) Charles v. Jones, 33 C. D. 80.

<sup>(</sup>z) Morgan & Wurtzburg's Treatise on Costs, 2nd ed., pp. 124—126, and 403.

only be allowed one set of costs between them (a); and if a trustee improperly refuses to join his cotrustee as plaintiff, and consequenty has to be made a defendant, he may be deprived of costs altogether (a). But, on the other hand, where, owing to one trustee being also a beneficiary, it is necessary that one should be plaintiff, and the other defendant, they will each be allowed separate sets of costs as between solicitor and client (b).

6. Paramount lien on trust property for trustees' expenses.—In an administration action, the costs of all parties were directed to be taxed and paid out of the trust estate, the costs of the trustees to include any charges and expenses properly incurred by them. It subsequently appeared probable that the trust fund would be insufficient for the payment of the whole of the costs in full, and the trustees moved to vary the minutes by the insertion of a direction that if the trust funds were insufficient to pay the whole of the costs, charges, and expenses thereby directed to be taxed and paid, their costs, charges, and expenses should be paid in priority to the costs of the beneficiaries. Bacon, V.-C., in giving judgment, said: "It is a good rule that trustees should have a priority for their costs, because, until those costs are provided for, it is impossible to say what the trust fund is. I, therefore, hold that these trustees are entitled to

(b) Re Love, Hill v. Spurgeon, supra.

<sup>(</sup>a) Hughes v. Key, 20 B. 395; Gompertz v. Kensit, 13 Eq. 369.

payment of their costs, charges, and expenses, in priority to the costs of all other parties, and the order must therefore be varied accordingly" (c). In short, the trustees' lien takes precedence of all beneficial interests. Even where property is settled on a married woman for life, without power of anticipation, and she improperly commences administration proceedings, which are dismissed with costs against her personally, the court may authorize the trustees to recoup themselves out of her life interest (d).

7. Trustees' lien good even where settlement void under Bankruptcy Act.—One Holden executed a post-nuptial voluntary settlement. He subsequently commenced an action to set it aside, but failed in his contention, the action being dismissed with costs. He then became bankrupt within two years of the date of the settlement, which accordingly became void under sect. 47 of the Bankruptey Act, 1883. It was held that, although the settlement was void, yet as it had originally been valid, but voidable, and as the trustees had incurred costs in the execution of their duty which they could not recover from the bankrupt, they were entitled to be fully indemnified out of the trust funds (e). It would seem, however, that the same principle does not apply to settlements void under

(e) Re Holden, 20 Q. B. D. 43.

<sup>(</sup>c) Dodds v. Tuke, 25 C. D. 617.

<sup>(</sup>d) Edwards v. Dewar, 34 W. R. 62; and conf. Married Women's Property Act, 1893, s. 2.

the 13th Eliz. c. 5, or to cases where the execution of the settlement was an act of bankruptcy (f).

- 8. Exception where trustee has mixed his money with trust fund.—Where, however, a trustee for purchase has advanced money of his own to enable a particular property to be purchased, the price of which exceeded the whole trust fund, it was held that he had not a first charge on the property for reimbursing himself his advance, but that the beneficiaries had a first charge on the estate for the amount of the trust fund, and that he only had a second charge for the amount of his advance (a). The ratio decidendi in this case would seem to have been, that it was not so much a question of indemnity for costs and expenses incurred in the performance of his duty as of a gratuitous mixing of his own moneys with the trust moneys; and that that (as will be seen later on) gave the trust estate a first and paramount charge.
- 9. Other instances of costs allowed trustees.—It has been held that a trustee is entitled to be reimbursed costs of former trustees, paid by him to their personal representatives previously to the latter transferring the trust estate (h). He is also entitled to be reimbursed costs incurred by him previously to his appointment, in obtaining a

<sup>(</sup>f) See Re Butterworth, 19 C. D. 588; Dutton v. Thompson, 23 C. D. 278; Exp. Vaughan, 14 Q. B. D. 25. (g) Re Pumphrey, Worcester, &c. Banking Co. v. Blick, 22 C. D. 255.

<sup>(</sup>h) Harvey v. Oliver, W. N. 1887, p. 149.

statement of the trust property, and ascertaining that the power of appointing new trustees was being properly exercised (q); and also costs incurred by the donee of the power of appointment in relation to the trustee's appointment (h).

10. Costs of trustees who have committed a breach of trust.—Where the sole object of a suit is to make trustees answerable for breach of trust, and a judgment to that effect is obtained, the trustees will not only not get their costs allowed, but will almost invariably have to pay the costs of the plaintiffs up to the judgment (i); and the costs subsequent to the judgment will be in the discretion of the judge, who may disallow the trustee his costs if he considers that, but for the trustee's misconduct, there would have been no need for the action at all (j). And the same result will follow where the conduct of a trustee is vexatious or oppressive (k), or unreasonably cautious (l).

<sup>(</sup>g) Re Pumphrey, Worcester, &c. Banking Co. v. Blick, 22 C. D. 255.

 <sup>(</sup>h) Harvey v. Oliver, W. N. 1887, p. 149.
 (i) Per Lord Langdale, Byrne v. Norcott, 13 B. 336; Gough v. Etty, 20 L. T. 358; Easton v. Landor, 67 L. T. 833.

<sup>(</sup>j) Easton v. Landor, supra.

<sup>(</sup>k) See Marshall v. Sladden, 4 D. & S. 468; Patterson v. Woolen, 2 C. D. 586; Att.-Gen. v. Murdoch, 2 K. & J. 571; Palairet v. Carew, 32 B. 564; Griffen v. Brady, 39 L. J., Ch. 136.

<sup>(</sup>l) Smith v. Bolden, 33 B. 262; Re Cull, 20 Eq. 561; Firmin v. Pulham, 2 D. & S. 99; Cockcroft v. Sutcliffe, 25 L. J., Ch. 313; and see also cases collected in Morgan & Wurtzburg's Treatise on the Law of Costs, 2nd ed., p. 412 et seq.

But where an administration suit is necessary, apart from the breach of trust, and the latter only forms an incidental feature of the suit, the trustee will, as a rule, be allowed his general costs of the suit as between solicitor and client, although he may have to pay the special costs caused by the breach (m). But he will not be allowed to receive them until he has made good the loss to the estate caused by his breach (n). And, in spite of a decision of the late V.-C. Hall to the contrary (o), the weight of authority is in favour of applying the same rule to costs incurred by a trustee defendant, even after he may have become bankrupt (p).

11. Expenses incurred in unsuccessfully defending an action.—Where a trustee takes upon himself the responsibility of defending an action in relation to the trust estate without procuring the sanction of the court, and the defence is unsuccessful, the onus lies upon him of proving that he had reasonable grounds for defending it. If he cannot prove such grounds, he is not entitled to retain out of the trust property the costs of the action beyond the amount which he would have incurred if he had applied for leave to defend (q).

(n) Re Knott, Bax v. Palmer, 56 L. J., Ch. 318.

<sup>(</sup>m) Pride v. Fooks, 2 B. 430; Campbell v. Bainbridge, 6 Eq. 269; Bell v. Turner, 47 L. J., Ch. 75.

<sup>(</sup>v) Clare v. Clare, 21 C. D. 865. (p) Lewis v. Trask, 21 C. D. 862 (North, J.); Re Basham, Hannay v. Basham, 23 C. D. 195 (Chitty, J.); McEwen v. Crombie, 25 C. D. 175 (North, J.).

<sup>(</sup>q) Re Beddoe, Downes v. Cottam, (1893) 1 Ch. 547.

12. Unreasonable expenses disallowed.—Trustees will not be allowed to reimburse themselves every out of pocket expense, but only such as are reasonable and proper under the circumstances. where a receiver (who is, of course, a trustee) made several journeys to Paris, in order that he might be present at the hearing of a suit brought in the French courts in relation to the trust property, and it appeared that his presence was wholly needless (the sole question being one of French law, and not of fact), his travelling expenses were disallowed, on the ground that they were, under the circumstances, improperly incurred (r).

13. And so where trustees attempted, at the solicitation of their beneficiaries, some of whom were married women without power of anticipation, to sell the trust property before the date named in the settlement, it was held that they were not entitled to be indemnified against the costs of an action for specific performance brought against them by the purchaser (s).

14. Again, a trustee, although entitled to obtain legal advice in relation to the execution of the trust, is not entitled, out of an excess of caution, to charge the estate with unnecessary legal proceedings. For instance, on retirement, he is not entitled to have an attested copy of the settlement, or of the appointment of new trustees, made at the expense of the estate (t).

<sup>(</sup>r) Malcolm v. O'Callaghan, 3 M. & C. 62.(s) Leedham v. Chawner, supra.

<sup>(</sup>t) Water v. Anderson, 11 Ha. 301.

ART. 66.—Right to Discharge.

Upon the completion of the trust, a trustee is entitled to have his accounts examined and settled by the beneficiaries, and either to have a formal discharge given to him or to have the accounts taken in court. He cannot, however, demand a release under seal (u).

ILLUST. 1.—Thus, a trustee, on finally transferring stock to a beneficiary, demanded from the latter a deed of release. The beneficiary, however, refused to give him anything except a simple receipt for the amount of stock actually transferred, which, of course, left it open to him to say that that amount was not the amount to which he was entitled. The court held, that no deed was demandable, but the judge said: "Though it may not have been the right of the trustee to require a deed, I think that it was his right to require that his account should be settled; that is to say, that he and his family should be delivered from the anxiety and misery attending unsettled accounts, and the possible ruin, which they who are acquainted with the affairs daily litigated in the Court of Chancery well know to be a frequent result of neglect in such a matter. . . . He was

<sup>(</sup>u) Chadwick v. Heatley, 2 Coll. 137; Re Wright, 3 K. & J. 421; King v. Mullins, 1 Dr. 311.

bound to give an account if demanded, but giving the accounts he was entitled (to use a familiar phrase) to have them wound up. It is true that the accounts, though settled, might be liable to be surcharged and falsified. That might or might not be, but still the trustee had a right to have his accounts gone through, executed, and settled. . . . If the plaintiff was satisfied, upon the accounts as sent in, that nothing more was coming to him, he should have expressed his willingness to close the account. On the other hand, if he was dissatisfied with it, he should have asked to have the account taken" (r).

2. "In the case of a declared trust, when the trust is apparent on the face of the deed, the fund clear, the trust clearly defined, and the trustee is paying either the income or the capital of the fund, if he is paying it in strict accordance with the trusts, he has no right to require a release under seal. It is true that in the common case of executors, when the executorship is being wound up, it is the practice to give executors a release. An executor has a right to be clearly discharged, and not to be left in a position in which he may be exposed to further litigation; therefore, he fairly says, unless you give me a discharge on the face of it protecting me, I cannot safely hand over the fund; and therefore it is usual to give a release; but such a claim on the part of a trustee would, in strictness, be improper, if he is paying

<sup>(</sup>v) Chadwick v. Heatley, supra.

in accordance with the letter of the trust. In such a case he would have no right to a release "(x).

3. Where trust moneys have been re-settled, the trustees or executors of the original settlement or will are, it has been said, entitled to a release under seal from their beneficiaries, though they are entitled only to a mere receipt from the trustees to whom they pay the moneys (y). But, on the other hand, where a married woman, having a general power of appointment by will, appoints the fund in pursuance of the power and appoints executors, the trustees of the fund can safely hand it over to the executors on their receipt, and cannot demand a release under seal from the beneficiaries (z).

Art. 67.—Right to take Direction of a Judge (a).

(1) Trustees may, in cases of any doubt as to what course they ought to adopt, safe-guard themselves by taking out an originating summons, returnable in the chambers of a judge of the Chancery Division, for the determina-

<sup>(</sup>x) Per Kindersley, V.-C., in King v. Mullins, 1 Drew. 311.

<sup>(</sup>y) Re Cater, 25 Beav. 366.

<sup>(</sup>z) Re Hoskin, 5 C. D. 229; 6 ibid. 281.
(a) The taking of a judge's advice on petition, under the statute 22 & 23 Vict. c. 35, s. 30, is practically obsolete.

tion (without general administration by the court) of:—

- α. Any question affecting the rights or interests of the cestuis que trusts (b).
- β. The ascertainment of any class of creditors, legatees, devisees, next of kin, or others (c).
- $\gamma$ . The approval of any sale, purchase, compromise, or other transaction (d).
- 5. The determination of any question arising in the administration of the trust (e), including any question as to the proper construction of the settlement (f).
- (2) The judge has power on such summons to make declarations binding the parties; but as a general rule no such declarations will be made as to future or contingent rights, except where the futurity is not remote, or the contingency is about

<sup>(</sup>b) R. S. C. 1883, Ord. LV. r. 3 (a). A similar summons may be taken out by any of the cestuis que trusts.

<sup>(</sup>c) Ibid. (b). (d) Ibid. (f).

<sup>(</sup>e) Ibid. (g). (f) R. S. C. 1893, Ord. LIVa.

to be destroyed, and the parties reasonably desire to ascertain their rights so as to mould their conduct accordingly (q).

Illust. Almost any question of construction or administration can now be decided on originating summons, except (1) cases in which it is sought to make trustees responsible for breach of trust, at all events where wilful default is charged (h); or (2) questions affecting a person claiming adversely to the settlement (i); or (3) questions as to a legal devise (k); or (4) questions involving the cancellation of instruments (l). The reader is referred for examples of cases decided on originating summons to the Annual Practice, Ord. LV. r. 3.

ART. 68.—Right to pay Trust Funds into Court
under certain circumstants

"(1) Trustees, or the majority of trustees, having in their hands or under their control money or secu-

<sup>(</sup>g) See Re Behrens, W. N. 1888, p. 95.
(h) See per Lord Macnaghten, Dowse v. Gorton, (1891) App. Cas. 202; and see Re Weall, 37 W. R. 779; and Re Hengler, W. N. 1893, p. 37.

<sup>(</sup>i) Re Bridge, 56 L. J., Ch. 779; Re Royle, 43 C. D. 18. (k) Re Carlyon, 35 W. R. 155; Re Davies, 38 C. D. 210;

Re Royle, supra; sed quære since R. S. C. 1893, Ord. LIV. (a). (1) See Re Garnett, Gandy v. Macauley, 32 W. R. 474; and Re Ellis, 59 L. T. 924.

rities belonging to a trust, may pay the same into the High Court; and the same shall, subject to rules of court, be dealt with according to the orders of the High Court.

"(2) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or

securities so paid into court.

"(3) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depositary, the court may order payment or delivery of the moneys or securities to the majority of the trustees for the purpose of payment into court, and every transfer payment and delivery made in pursuance of any such order shall be valid and take effect as if the same

had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered "(m).

(4) Payment into court is not, however, justifiable merely in order to determine some question which can be determined more cheaply by means of an originating summons (n), nor where the equities are perfectly clear (o); and if trustees do so, they may have to pay the costs of getting the money paid out (p).

ILLUST.-1. Payment into court where beneficiaries are under disability.—A trustee is justified ... in paying money into court where he cannot get a valid discharge; as, for instance, where beneficiaries

<sup>(</sup>m) Trustee Act, 1893, s. 42. It would seem at first sight that by the operation of sub-sect. 6 of sect. 25 of the Judicature Act, 1873, these provisions are extended to all constructive trustees, such as insurance companies, &c. But although in one case (Re Haycock, 1 C. D. 611) this was held to be so, that view has been twice dissented from. (Matthew v. Northern Assurance Co., 9 C. D. 80, and Re Sutton, 12 C. D. 175). Whether, however, these cases are still binding authorities, having regard to sect. 50 of the Trustee Act, 1893 (definition of "Trustee,") seems open to question.

<sup>(</sup>n) Re Giles, 34 W. R. 712. (o) Re Cull, 20 Eq. 561; Re Elliott, 15 Eq. 194.

<sup>(</sup>p) Ibid., and Re Leake, 32 B. 134; Re Heming, 3 K. & J. 40.

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who are absolutely entitled are infants (q) or lunatics (r).

- 2. Dispute between beneficiaries. Formerly where, under a creditor's deed, money was claimed both by the settlor and the creditors, the trustee was held to have been justified in paying the money into court (s). Whether, however, this decision could be sustained, seems questionable; for, as has been previously explained, the creditors are not beneficiaries, and it seems to be scarcely consistent with principle, to hold that a mere agent can pay into court money intrusted to him by his principal, on the ground that a third party claims an interest in it (t).
- 3. Where money claimed by a representative.— It has been said that a trustee may properly pay money into court where it is claimed by the representative of a beneficiary; for non constat but that the latter may have disposed of it (u). But here again an originating summons would seem to be the more appropriate course.
- 4. Payment to one who claims in default of appointment.—A trustee ought not to hesitate to pay the money to a beneficiary who claims in default of appointment, if he has no notice of any

<sup>(</sup>q) Re Cawthorne, 12 B. 56; Re Beauclerk, 11 W. R. 203; Re Coulson, 4 Jur. (N. S.) 6; Re Richards, 8 Eq. 119.

<sup>(</sup>r) Re Upfull, 3 M. & G. 281; Re Irby, 17 B. 334. (s) Re Headington, 6 W. R. 7; but see Re Moseley, 18 W. R. 126.

<sup>(</sup>t) See Art. 45, supra, p. 388.

<sup>(</sup>u) Re Lane, 24 L. T. 181; King v. King, 1 D. & J. 663, sed quære.

appointment by the donee of the power, and no ground for believing that any appointment has been made; for in that case they could not be made liable if they paid over the fund, even if an appointment were subsequently discovered (x). Anyhow, now, trustees in such a case would only be allowed the costs of a summons.

- 5. Payment into court to enable married woman to assert equity to a settlement. - Where the beneficiary is a married woman, married before 1883, and whose title accrued prior to that date, it has been held that the trustee may pay into court, in order that she may assert her equity to a settle-But in cases to which the Married ment. Women's Property Act, 1882, applies, it is conceived that a trustee could not properly pay into court, because she and not her husband would be the absolute owner.
- 6. Reasonable doubt or claim.—Again, where the trustee has a bonâ fide doubt as to the law (y), or has received a bonâ fide claim sanctioned by respectable solicitors (z), he may properly pay the fund into court, unless the question could be settled by summons.
- 7. Undue caution.—But where a beneficiary in reversion who had gone to Australia, and had not

<sup>(</sup>x) Per Jessel, M.R., Re Cull, 20 Eq. 561, distinguishing Re Wylly, 28 B. 458; but see also Re Swan, 2 H. & M. 34; Re Roberts, 17 W. R. 639; Re Bendyshe, 5 W. R. 816; Re Williams, 4 K. & J. 87.

<sup>(</sup>y) King v. King, 1 D. & J. 663; Re Metcalfe, D. J. & S. 122; Gunnell v. Whitear, 18 W. R. 883.

<sup>(</sup>z) Re Maclean, 19 Eq. 282.

been heard of for some years, suddenly reappeared, and there was no reasonable doubt as to his identity, it was held that the trustee was not entitled to pay the trust fund into court instead of paying it over to him, Malins, V.-C., saying: "I think these proceedings were perfectly unjustifiable; and although it is clear that the court will incline towards the payment of the costs of trustees when they act in a bonâ fide way, yet, on the other hand, it is most important that trustees should not incur unnecessary expenses for the purpose of relieving themselves of all liability, and particularly so when there is no reasonable doubt." His honour therefore ordered the trustees to pay the costs of all parties (a).

8. General warning.—Lastly, the reader must be warned that now that most questions of doubt or difficulty can be decided on originating summons, the right of paying money into court can only be used with safety in very rare cases. It seems matter for regret that those who were responsible for the drafting of the Trustee Act, 1893, did not insert some words in sect. 42, warning trustees of the danger they run in accepting the apparently unconditional invitation extended to them by the words of that section, an invitation which in most cases can only be accepted at the risk of having to pay costs.

<sup>(</sup>a) Re Elliott, 15 Eq. 194; Re Foligno, 32 Bea. 131; Re Knight, 27 ibid. 45; Re Woodburn, 1 D. & J. 333.

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Art. 69.—Right under certain circumstances to have the Trust administered by the Court.

(1) Where the trust property is not capable of being paid or transferred into court, or where the trustee wishes to be discharged from the office of trustee, he may institute an action for the administration of the trust by the court (b). But it is not obligatory on the court to make an order for administration, if the questions between the parties can be properly determined without it (c).

(2) Where, however, the equities are perfectly clear and unambiguous (d), or the trustee merely craves to be released from caprice or laziness, or is otherwise not justified in the course he has pursued (e), he will have to pay all the costs; and even where he acts

(c) R. S. C. 1883, Ord. LV. r. 10; Re Blake, Jones v. Blake, 29 C. D. 913.

(e) Forshaw v. Higginson, 20 B. 845; Re Stokes, 13 Eq. 333; Re Cabburn, 46 L. T. 848.

<sup>(</sup>b) Talbot v. Earl Radnor, 3 M. & C. 252; Goodson v. Ellison, 3 Russ. 583; and as to summons, R. S. C. 1883, Ord. LV. r. 3.

<sup>(</sup>d) Re Kuight. 27 B. 145; Lawson v. Copeland, 2 B. C. C. 156; Re Elliott, 15 Eq. 194; Re Foligno, 32 B. 131; Re Woodburn, 1 D. & J. 333; Beattie v. Curzon, 7 Eq. 194; Re Hoskins, 5 C. D. 229.

bonâ fide, but without any real cause, he will not be allowed his own costs(f). And where he brings an action when the same object might have been obtained by payment into court or by a summons in chambers (g), he will not be allowed the extra costs occasioned thereby (h); and he will always appeal from an order of the court at his own risk (i).

Illust.—1. When general administration will be ordered.—With regard to actions for the administration of a trust by the court, such actions are now comparatively rare. Formerly, a decree for general administration (that is to say, a decree whereby the court took upon itself to supervise the execution of the trust) was granted to a trustee or a beneficiary as a matter of course; and the only check upon an abuse of the process of the court, was the rather remote contingency that the trustee might possibly be deprived of his costs, or, in very flagrant cases, have to pay the costs of all parties, upon the action coming on for further consideration. However, by the Rules of

(g) Re Giles, 34 W. R. 712.

<sup>(</sup>f) Re Leake, 32 B. 135; Re Heming, 3 K. & J. 40.

<sup>(</sup>h) Wells v. Malbon, 31 B. 48; but see Smallwood v. Rutter, 9 Ha. 24.

<sup>(</sup>i) Rowland v. Morgan, 13 Jur. 23; Tucker v. Horneman, 4 D., M. & G. 395.

the Supreme Court, 1883, Ord. LV. r. 10, the old practice has been reversed, and now it is no longer obligatory upon the court or a judge to pronounce or make a judgment or order for the administration of any trust, if the questions between the parties can be properly determined on summons without such judgment or order, as mentioned in Article 67. The principles on which the court will, under this new rule, grant or refuse general administration, have been discussed in two cases, one before the late Mr. Justice Pearson (k), and the other before the Court of Appeal (1), in which the learned Lords Justices were more inclined to restrict the right to a decree than was Mr. Justice Pearson. Lord Justice Cotton in the latter case said: "Formerly, if anyone interested in a residuary estate instituted a suit to administer the estate, he had the right to require, and as a matter of course obtained, the full decree for the administration of the estate; and the court, even if it thought that, although there were really questions which required decision, these questions might be decided upon some only of the accounts and inquiries which formed part of the decree, found itself fettered and unable to restrict the accounts and inquiries to such only as were necessary in order to work out the question. Now, however, the practice is laid down by rule 10 of Ord. LV., as follows:-" (His Lordship here

 <sup>(</sup>k) Re Wilson, Alexander v. Calder, 28 C. D. 457.
 (l) Re Blake, Jones v. Blake, 29 C. D. 913.

read the rule and continued) "Where there are questions which cannot properly be determined without some accounts and inquiries or directions which would form part of an ordinary administration decree, then the right of the party to have the decree or order is not taken away, but the court may restrict the order simply to those points which will enable the question which requires to be adjudicated upon, to be settled. is the result of Ord. LV. r. 10. Then we have Ord. LXV. r. 1, which says, 'subject to the provisions of the acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge.' These two rules must be read together, and we then find this: that if a party comes and insists that there is a question to be determined, and, for the purpose of determining that question, asks for an administration judgment, the court cannot refuse the judgment unless it sees that there is no question which requires its decision; but rule 1 of Ord. LXV. puts the party who applies for the judgment and insists upon it in this position—that if it turns out that what has been represented as the substantial question requiring adjudication is one which was not a substantial question, or that the applicant was entirely wrong in his contention as to that particular question, the court can, and, in my opinion, ought ordinarily to, make the person who gets the judgment pay the costs of all the proceedings consequent upon his unnecessary, or possibly vexatious, application to the court" (m).

2. Deductions from Lord Justice Cotton's judgment.—It will be seen, from the above judgment, that now that almost all isolated questions of construction or administrative difficulty can be dealt with singly, very few cases can arise necessitating general administration, except where the trustees cannot pull together, or the circumstances of the estate give rise to ever recurring difficulties requiring the frequent direction of the court, or where a primâ facie doubt is thrown on the bona fides, or the discretion of one or more of the trustees. Possibly, also, it would still be held that a trustee would be entitled to a general administration judgment, to relieve him of trouble and annovance, in a case such as the following, viz., where there were divers disputes as to the proper beneficiaries, out of which disputes several actions had sprung, to all of which the trustee was a necessary defendant (n). For if he brings the money into court under the act, he still remains a trustee, and though he would be under no liability quoad the fund brought in, he would not be discharged from liability quoad the past income; and, moreover, he must be served with

<sup>(</sup>m) This seems to refer rather to the case of an action commenced by a beneficiary. It requires a very flagrant case to render a trustee liable to pay costs; see p. 518, supra.

<sup>(</sup>n) Barker v. Peile, 2 Dr. & Sm. 340; and see Hirst v. Hirst, 9 Ch. App. 262.

notice of all proceedings under the act in relation to the fund, and this of necessity would compel him to incur some expense in employing a solicitor.

3. But where there is no dispute respecting the amount of a trust fund, and no justifiable ground for the trustee retiring from his office, the only doubt being as to the proper persons entitled, and the trustee, instead of paying the money into court under the Trustee Act, or, issuing an originating summons, institutes a suit for the purpose of having the rights of the beneficiaries declared, he will be allowed such costs only as he would have been entitled to if he had paid the fund into court under the act (o), or had issued a summons (p).

<sup>(</sup>o) Wells v. Malbon, 31 B. 48. (p) Re Giles, 34 W. R. 712.

#### Division V.

# THE CONSEQUENCES OF A BREACH OF TRUST.

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- ART. 70. Measure of the Trustee's Responsibility.
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#### CHAPTER I.

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  - , 75. Fraudulent Breach of Trust a Crime.

# Art. 70.—The Measure of the Trustee's Responsibility.

(1) The general measure of a trustee's responsibility for a breach of trust, is the amount by which the trust property has been depreciated without interest (a): But—

<sup>(</sup>a) See Att.-Gen. v. Alford, 4 D., M. & G. 851; Stafford v. Fiddon, 23 B. 386; Vyse v. Foster, 8 Ch. App. 333,

- α. Where he has received interest, he is liable to account for it (b).
- β. Where he ought (if he had obeyed the trust) to have received interest, he will be liable to account for what he ought to have received (c).
- y. Where the object of the breach was to further his own personal advantage (d), he will be estopped from denying that he actually received interest, and will be liable to pay simple interest at 4 or 5 per cent., according to the circumstances; and where he has employed the trust property in trade or speculation, he will be liable at the option of the beneficiaries, either to pay compound interest at 5 per cent., with yearly, or even half-yearly,

aff. 7 H. L. 318; Burdick v. Garrard, 5 Ch. App. 233; and Hale v. Sheldrake, 60 L. T. 292; but see Ex parte Ogle, 8 Ch. App. 717, which, however, seems to be quite inconsistent with all the other authorities, as the trustee did not receive interest, nor was there any evidence that he ought to have received the rate (5 per cent.) charged against him.

<sup>(</sup>b) Cases cited in note (a), and also Jones v. Foxall, 15 B. 392.

<sup>(</sup>c) Att.-Gen. v. Alford, supra; Stafford v. Fiddon, supra; Price v. Price, 42 L. T. 636.

<sup>(</sup>d) See and consider judgments, Att.-Gen. v. Alford, supra.

rests, if he may reasonably be presumed to have made that amount, or to account for all the profits made by him(e).

(2) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security is deemed an authorized investment for the smaller sum, and the trustee is only liable to make good the sum advanced in excess thereof with interest (f).

ILLUST.—1. Loss caused by disobeying the directions of the settlement.—For a good example of the measure of the trustee's liability for disregarding the express directions of the settlement, the reader is referred to illustration 5, on p. 255, supra. Another (which seldom occurs now) happens where trustees are expressly directed to invest in

Burdick v. Garrard, supra.

<sup>(</sup>e) See Jones v. Foxall, supra; Vyse v. Foster, supra;

<sup>(</sup>f) Trustee Act, 1893, s. 9. This section applies to investments made as well before as after the commencement of the act, except where an action or other proceeding was pending with reference thereto, on the 24th day of December, 1888. Prior to the latter date the trustee had to take over the mortgage and to pay the actual money invested.

particular securities (ex. gr., British Government funds), and, instead of doing so, retain the money in their hands. In such cases the beneficiaries may elect either to claim the money itself, or the amount of government stock which the trustees might have purchased therewith at the date when they ought to have made the investment (q). However, where trustees have a choice of investments, it is obvious that the same rule cannot apply, because it would be impossible to say which of them they would have chosen if they had exercised their discretion. In such cases, therefore, the beneficiaries are only entitled to the money with interest at 4 per cent. (h).

- 2. Not liable for increased value caused by act of third party after breach.—The trustee of gas shares allowed the husband of one of the beneficiaries to get them into his hands. The husband surrendered them to the company, accepting allotments of new shares in their stead, on which new shares he paid calls, and finally became bankrupt. On these facts, it was held that the trustee was only liable for the value of the shares, less the calls paid by the husband, that being the true measure of the loss to the trust (i).
- 3. Cases where there must always have been a loss.—So, where there must always have been a

<sup>(</sup>g) Shepherd v. Mouls, 4 Ha. 500, 504.
(h) Robinson v. Robinson, 1 D., M. & G. 295; Marsh v. Hunter, 6 Mad. 295.

<sup>(</sup>i) Briggs v. Massey, 30 W. R. 325; and see also Re Hulkes, Powell v. Hulkes, W. N. 1886, p. 111.

loss on the realization of trust property, apart from any breach of trust, then if a breach of trust further depreciates it, the measure of the trustee's responsibility is confined to the further depreciation, and he is not responsible for the difference between the nominal value and the actual amount realized (k).

- 4. Loss of interest caused by unreasonable delay in investing.—A trustee who is guilty of unreasonable delay in investing trust funds will be answerable to the beneficiaries for simple interest at 4 per cent. during the continuance of such delay (l); for if he had done his duty, interest would in fact have been received.
- 5. Breach of trust to accumulate.—On the same ground, where an executrix allowed trust money to remain uninvested in her solicitor's hands for nine years during the infancy of the beneficiary, she was charged with compound interest at the rate of 3 per cent. per annum, with half-yearly rests, as it was her duty to have accumulated the income, by investing it from time to time in consols (m).
- 6. Improper calling in of good security.—A trustee who, without proper authority, calls in trust property invested on mortgage at 5 per cent., would be liable for that rate of interest; for

<sup>(</sup>k) Lord Gainsborough v. Watcombe Terra Cotta Co., 54 L. J., Ch. 991.

<sup>(1)</sup> Stafford v. Fiddon, supra. But quære whether in these days the rate ought to be as high as 4 per cent.

<sup>(</sup>m) Gilroy v. Stephen, 30 W. R. 755 (Fry, J.); and see also Re Emmet, Emmet v. Emmet, 17 C. D. 142.

although he may not actually have received that rate, he ought to have done so (n).

7. Mixing trust funds with trustee's own moneys. -A trustee retained trust funds uninvested for several years, and mixed them with his own private moneys, but did not trade or speculate with them, or get any personal benefit from them. Lord Cranworth in delivering judgment, said: "Generally speaking, every executor and trustee who holds money in his hands is bound to have that money forthcoming; he is, therefore, chargeable with interest, and is almost always to be charged with interest at 4 per cent. It is presumed that he must have made interest, and 4 per cent, is that rate of interest which this court has usually treated it as right to charge." His lordship then commented on the misconduct attributed to the trustee, and proceeded as follows:-"It is not misconduct that has benefited him, unless indeed it can be taken as evidence that he kept the money fraudulently in his hands, meaning to appropriate it. In such a case, I think the court would be justified in dealing, in point of interest, very hardly with an executor, because it might fairly infer that he used the money in speculation, by which he either did make 5 per cent., or ought to be estopped from saying that he did not. The court would not inquire what had been the actual proceeds, but in application of the principle, in odium spoliatoris

<sup>(</sup>n) See judgment in Jones v. Foxall, supra; and see principles stated in Re Massingberd, Clark v. Trelawney, supra, pp. 255, 256.

omnia præsumuntur, would assume that he did make the higher rate, that is, if that were a reasonable presumption" (o).

8. Solicitor-trustee using trust funds in his business.—In Burdick v. Garrard (p), a solicitor, as the agent of the plaintiff, held a power of attorney from him, under the authority of which he received divers sums of money, and paid them into the bank to the credit of his (the solicitor's) firm. On a bill being filed by the client for an account, the Vice-Chancellor made a decree for payment of the principal with compound interest. The Court of Appeal, however, reversed this decision, Lord Hatherley saying: "The Vice-Chancellor has directed interest to be charged at the rate of 5 per cent., which appears to me to be perfectly right, and for this reason, that the money was retained in the defendants' own hands, and was made use of by them. That being so, the court presumes the rate of interest made upon money to be the ordinary rate of interest, viz., 5 per cent. I cannot, however, think the decree correct in directing halfyearly rests, because the principle laid down in the case of The Attorney-General v. Alford appears to be the sound principle, namely, that the court does not proceed against an accounting party by way of punishing him for making use of the

<sup>(</sup>o) Att.-Gen. v. Alford, supra; and see Jones v. Searle, 49 L. T. 91; and see Re Emmet, Emmet v. Emmet, 17 C. D. 142.

<sup>(</sup>p) 5 Ch. App. 233. See also Hale v. Sheldrake, 60 L. T. 292, where a husband of the tenant for life was ordered to replace a trust fund, but without interest, as the wife had allowed him to receive the income.

plaintiff's money, by directing rests, or payment of compound interest, but proceeds upon this principle, that either he has made, or has put himself into such a position that he is presumed to have made, 5 per cent., or compound interest, as the case may be." His Lordship then pointed out that no doubt where a trustee employs money in ordinary trade, he will be made liable for compound interest, because trade capital is presumed to yield it: but that that reason had no application to capital employed in a solicitor's business, upon which a solicitor is frequently receiving no interest at all. It may be also questioned whether, in these days, the court would presume the rate of interest made upon money to be 5 per cent.; for certainly it is no longer correct to say that 5 per cent., or even 4 per cent., is the ordinary rate of interest.

9. Partner trustee allowing trust fund to remain in business.—In order to charge a trustee with compound interest, or with actual profits for employing the trust funds in trade, there must be an active calling in of the trust moneys for the purpose of embarking them in the trade or speculation; a mere neglect to withdraw funds already embarked by the settlor in the trustee's trade, is not sufficient. In Vyse v. Foster (q) the facts were as follows:—A testator was partner in a well-established and prosperous business, one of the terms of the partnership being that, on the death of any partner, his share was to be taken

<sup>(</sup>q) 8 Ch. App. 309, affirmed 7 H. L. 318.

by the surviving partners at a certain price, which was to be paid by instalments extending over two years, with interest at 51. per cent. per annum from his death. The testator appointed three executors, one of whom was one of the partners in his business, and another some years after his death became a partner; the third never was concerned in the business. The value of the testator's share was ascertained, but not paid, the amount being allowed for some years to remain in the hands of the firm, who treated it in their books as a debt, and allowed interest on it at 51, per cent. per annum, with yearly rests. One of the testator's residuary legatees claimed, but unsuccessfully, to be entitled to a share in the profits of the business arising from the use of the testator's capital. Lord Justice James said: "Is the mere fact of the union of the three characters—debtor, executor, and trader—in the same person, sufficient to entitle the estate to an investigation into the trader's own business, because there has been some delay, or great delay in paying off the debt? We have found no case in which this has been laid down. even in the case of a sole executor, sole debtor, or sole trader. In no case, so far as we are aware, has it ever been held, that where there has been no active breach of trust in the getting in or selling out trust assets, but where there has been a mere balance on the account of receipts—legitimate receipts—and payments, the omission to invest the balance has made the executor liable to account for the profits of his own trade."

10. Liability for loss caused by insufficient mortgage security.—Prior to the Trustee Act, 1888, where a trustee invested the trust fund on mortgage, and advanced more than two-thirds of the value, that primâ facie constituted the entire investment a breach of trust. It was not an investment which the trustee ought to have made at all, and consequently having, by making it, committed a breach of trust, the whole item —the entire sum so invested—was disallowed him in his accounts, and the mortgage was either realized and he was charged with the deficiency, or he was directed to replace the entire sum, and upon doing so the mortgage became his absolutely (r). Consequently, although a trustee might only have erred in advancing, say one-eighth more than twothirds of the value, he thereby became liable to repay to the estate the whole of the amount invested, recouping himself so far as possible out of the mortgage. This is, however, no longer so, the 9th section of the Trustee Act, 1893, (re-enacting the 5th section of the Act of 1888) having enacted, that where a trustee has advanced too much on a mortgage security "which would at the time of the investment be a proper investment in all respects for a smaller sum," he will only be liable for the excess over that smaller sum, although that may not represent the loss to the estate. A trustee is not, however, protected by this enactment

<sup>(</sup>r) Fry v. Tapson, 28 C. D. 282; Re Whiteley, Whiteley v. Learoyd, 33 C. D., at p. 354.

Improper and Improvident Investment -Real Securities. ] - Where trustees invest a larger sum than is justified by the value of the pro-S. perty upon mortgage of undivided shares of real property, part of which consists of chinaclay works, and part of which is let on leases T one in all for lives, one of the trustees being himself onsequently, interested in other of the undivided shares, the investment is an improper one, and therefore invested on will not be deemed an authorised investment ex. gr. where for a smaller sum, under section 9, sub-section 1 ex. of the Trustee Act, 1893. Turner, In re; eholds, or of Barker v. Irimey, 66 L. J. Ch. 282; [1897] 1 uch as mines Ch. 536; 76 L. T. 116; 45 W. R. 495—Byrne, J. uch as mines norms or the mae, a trustee will still be liable for the entire sum invested. And where in such a case the trustee in fault retires, the new trustees may realize the security without notice to

ART. 71.—The Liability, Joint and Several.

him, and charge him with the entire deficiency (t).

Each trustee is in general liable for the whole loss when caused by the joint default of all the trustees, even although all may not have been equally blame-worthy (u); and a decree against all may be enforced against one or more only (x).

ILLUST.-1. All parties to breach are equally liable.—All parties to a breach of trust are

(x) Att.-Gen. v. Wilson, Cr. & Ph. 28; Fletcher v.

Green, 33 B. 426.

<sup>(</sup>s) Re Walker, Walker v. Walker, 59 L. J., Ch. 386.
(t) Re Salmon, Priest v. Uppleby, 42 C. D. 351.

<sup>(</sup>u) Wilson v. Moore, 1 M. & K. 126; Lyse v. Kingdom, 1 Coll. 184; Ex parte Norris, 4 Ch. App. 280. This applies not only to express trustees, but to all persons who meddle with the trust property with notice of the trust. See Cowper v. Stoneham, 68 L. T. 18.

equally liable, and there is between them no primary liability (y); and this liability is not confined to the express trustees, but extends to all who are actually privy to the breach of trust. Thus, where trustees delegated their trusteeship to their solicitors, who received the moneys, and did not invest them, but made use of them in their business, it was held that both the trustees and the solicitors were equally liable, and that judgment might be levied by the beneficiaries against the solicitors only (z). This principle does not, however apply to professional payments made by trustees to a solicitor or other agent who knows that the money is trust money, unless facts are brought home to him which show that, to his knowledge, the money was being applied in a manner inconsistent with the trust; or, in other words, that the solicitor or other agent was party either to a fraud, or to a breach of trust on the part of the trustees. As Mr. Justice Stirling put it in a recent case: "To make an agent liable to return costs, he must be fixed with notice that, at the time when he accepted payment, the trustee had been guilty of a breach of trust such as would preclude him altogether from resorting to the trust estate for payment of costs, so that in

<sup>(</sup>y) Per M. R., in Wilson v. Moore, 1 M. & K. 126. (z) Cowper v. Stoneham, 68 L.T. 18; and see also Blyth v. Fladgate, (1891) 1 Ch. 337, and art. 81, infra, where the liability of third parties is more fully discussed.

fact the application of the trust estate in payment of costs would be a breach of trust" (a).

ART. 72.—No Set-off allowed of Gain on one Breach against Loss on another.

A trustee is only liable for the actual loss in each distinct and complete transaction which amounts to a breach of trust, and not for the loss in each particular item of it(b); but a loss in one transaction or fund is not compensated by a gain in another and distinct one (c).

ILLUST.—1. Where breach of trust causes benefit to the estate, not liable for outlay.—In Vyse v. Foster (b), a testator devised his real and personal estates upon common trusts for sale, making them a mixed fund. His trustees were advised that a few acres of freehold land which belonged to him might be advantageously sold in lots for building purposes, and that, to develop their value, it was desirable to build a villa upon part of them.

<sup>(</sup>a) Re Blundell, Blundell v. Blundell, 40 C. D. 370. (b) Vyse v. Foster, 8 Ch. App. 336, affirmed 7 H. L. 318.

<sup>(</sup>c) Wiles v. Gresham, 2 Drew. 258; Dimes v. Scott, 4 Russ. 195; Ex parte Lewis, 1 Gl. & J. 69.

They accordingly built one at a cost of 1,600% out of the testator's personal estate. The evidence showed that the outlay had benefited the estate, but Vice-Chancellor Bacon disallowed the 1,600% to the trustees in passing their accounts. The Court of Appeal (and subsequently the House of Lords), however, reversed this, the Lord Justice James saying: "As the real and personal estate constituted one fund, we think it neither reasonable nor just to fix the trustees with a sum, part of the estate, bonâ fide laid out on other part of the estate, in the exercise of their judgment as the best means of increasing the value of the whole."

2. Loss on one transaction cannot be set-off against gain on another.—In Wiles v. Gresham (d), on the other hand, by the negligence of the trustees of a marriage settlement, a bond debt for 2,000% due from the husband was not got in, and was totally lost. Certain other of the trust funds were without proper authority invested in the purchase of land upon the trusts of the settlement. The husband, out of his own money, greatly added to the value of this land; and upon a claim being made against the trustees for the 2,0001. they endeavoured to set-off against that loss the gain which had accrued to the trust by the increased value of the land, but their contention was disallowed, the two transactions being separate and distinct.

<sup>(</sup>d) Supra.

- 3. Again, trustees had kept invested on unauthorized security a sum of money which they ought to have invested in consols, and which was in consequence depreciated. Eventually part of the money was invested in consols, at a far lower rate than it would have been if invested according to the directions in the will. The trustees elaimed to set-off the gain against the loss, but were not allowed to do so; because "at whatever period the unauthorized security was realized, the estate was entitled to the whole of the consols that were then bought, and if it was sold at a later period than it ought to have been, the executor was not entitled to any accidental advantage thence accruing (e). This case is at first sight difficult to be distinguished from Vyse v. Foster, but it will be perceived that the loss and gain resulted from two distinct transactions. The loss resulted from a breach of trust in not realizing the securities; the gain arose from a particular kind of stock being at a lower market value than usual at the date at which the trustees bought it.
- 4. Where, however, trustees committed a breach of trust in lending trust moneys on mortgage, and upon a suit by them the mortgaged property was sold, and the money paid into court and invested in consols pending the suit, and the consols rose in value, the trustees were allowed to set-off the gain in the value of the consols against the loss under the mortgage, for the gain and loss arose

<sup>(</sup>e) Dimes v. Scott, 4 Russ. 195.

out of one transaction (f). It is, however, very difficult to reconcile this case with the last one, but it seems to be reasonable, and in accordance with common sense.

ART. 73.—Property acquired either wholly or partly out of Trust Property becomes liable to the Trust.

(1) If a trustee has, in breach of trust, converted trust property into some other form, or has invested it in some unauthorized shape, the property into which the trust property has been so converted, or the investments in which it has been so invested, become subject to the trust. If all the beneficiaries are sui juris, they can collectively elect to adopt the breach, and take the property as it then stands; but if one of them objects to do so, he may require it to be reconverted, and in that case any gain accrues to the trust estate, and any loss falls on the trustee (q).

<sup>(</sup>f) Fletcher v. Green, 33 B. 426.
(g) See per Pearson, J., Patten v. Guardians of Edmonton, 31 W. R. 785; Re Hallett, Knatchbull v. Hallett, 13 C. D. 696; Taylor v. Plumer, 3 M. & S. 562; Frith v. Cartland,

(2) If a trustee has mixed trust moneys with his own, or has, partly with his own and partly with trust moneys, purchased other property or investments, then the beneficiaries cannot elect to take the whole of the mixed fund or the entire property or investments so purchased; but if the mixed fund, or the property or investments so purchased, can be traced (into whatever form they may have been converted), the beneficiaries will be entitled to a first charge thereon (h).

ILLUST.—1. Stock bought with trust money.—
Thus, where money is handed to a broker for the purpose of purchasing stock, and he invests it in unauthorized stock, and absconds, the stock which he has purchased will belong to the principal, and not to the broker's trustee in bankruptcy. For a broker is a constructive trustee for his principal, and, as was said by Lord Ellenborough, "the property of a principal, entrusted by him to his

<sup>2</sup> H. & M. 417; Hopper v. Conyers, 2 Eq. 549; Lane v. Dighton, Amb. 409; Scales v. Baker, 28 B. 91; Cook v. Addison, 7 Eq. 466; Ernest v. Craysdill, 2 D., F. & J. 175; Ex parte Barker, 28 W. R. 522.

<sup>(</sup>h) Re Hallett, Knatchbull v. Hallett, 13 C. D. 696; Lupton v. White, 15 V. 432; Pennell v. Deffell, 4 D., M. & G. 372; and see also Re Pumphrey, Worcester, &c. Banking Co. v. Blick, 22 C. D. 255, cited supra, p. 521.

factor for any special purpose, belongs to the principal, notwithstanding any change which that property may have undergone in form, so long as such property is capable of being identified and distinguished from all other property" (i).

2. Money produced by trust chattels .- So, if goods consigned to a factor be sold by him and reduced into money, yet if the money can be traced—as, for instance, where it has been kept separate and apart from the factor's own moneys, or kept in bags, or the like (k), or has been changed into bills or notes (l), or into any other form (m), or has been paid into the factor's account at the bank (n)—the employer, and not the creditors of the factor, will, upon his bankruptcy, be entitled to the property into which it has been converted. For the creditors of a defaulting trustee can have no better right to the trust property than the trustee himself; and it makes no difference in this respect that the trustee committed a breach of trust in converting the property; for an abuse of trust can confer no right on the person abusing it, nor on those claiming through him (o).

3. Sale by trustees of property wrongfully acquired out of trust moneys.—So, where the trustees

<sup>(</sup>i) Taylor v. Plumer, supra; Ex parte Cook, 4 C. D. 123; Re Hallett, Knatchbull v. Hallett, 13 C. D. 696.

<sup>(</sup>k) Tooke v. Hollingworth, 5 T. R. 277.

<sup>(</sup>l) Ex parte Dumas, 2 V. sen. 582. (m) Frith v. Cartland, 2 H. & M. 417; Birt v. Birt, 11 C. D. 772.

<sup>(</sup>n) Re Hallett, Knatchbull v. Hallett, supra.

<sup>(</sup>o) Taylor v. Plumer, supra.

of a will invested trust moneys in an unauthorized purchase of land, and afterwards contracted to sell it for a largely increased price, it was held that they were acting properly in so doing, and that the concurrence of one beneficiary was sufficient to make a good title, on the purchasers seeing that the purchase-money was invested in the names of the trustees as trustees (p). For, as Mr. Justice Pearson put it: "I see no reason why the trustees should not now do what it was all along their duty to do, and what the court would have ordered them to do. At the same time, I agree that it would be proper to take the concurrence of one of the cestuis que trusts, because, if all of them elected to take their shares of the land after it had been purchased, they would have been entitled to do so; but if one of them objected to take the land, but required that it should be sold, then the others could not compel him to take his share of the land as representing his share of the money."

4. Trust property mixed with other property so as to be untraceable.—The case is comparatively simple where (as in the foregoing illustrations) the trustee has spent or converted the trust property, and nothing but the trust property. It, however, becomes more difficult when the trustee has mixed the trust moneys with his own, and either kept the mixed fund, or spent it in the purchase of other property. The case then turns entirely upon the question, whether the mixed fund, so formed,

<sup>(</sup>p) Patten v. Guardians of Edmonton, 31 W. R. 785.

can be identified, or, if it has been spent, whether it can be traced into the property which has been purchased with it. If it has become so mixed up with the trustee's private property as to render it impossible to trace it (for instance, where it has been converted into money, which has been put in circulation (q), or has otherwise become indistinguishable), then, as the right of the beneficiary is only to have the actual trust property or that which stands in its place, or to have a charge on it, and as the actual property is gone and that which stands in its place cannot be identified, the beneficiary can only proceed against the trustee generally for the breach of trust, or, if he be bankrupt, can only prove as a creditor (r).

5. Trust property mixed with other property which can be traced.—But where the mixed fund can be traced (as, for instance, where the trustee has paid in the trust fund to his general banking account (s), the beneficiaries will have a charge, or lien, upon the whole mixed fund. case of Re Hallett, Knatchbull v. Hallett (s), the late Sir George Jessel, M. R., elaborately reviewed all the authorities touching on this ques-His Lordship said :- "The modern doctrine of equity, as regards property disposed of by persons in a fiduciary position, is a very clear and

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 <sup>(</sup>q) Miller v. Race, 1 Bar. 457.
 (r) Ex parte Dumas, 1 Ab. 234; Ryall v. Roll, Ch. 172; Scott v. Surman, Willes, 404.

<sup>(</sup>s) Re Hallett, Knatchbull v. Hallett, 13 C. D. 696, overruling the decision of Fry, J., in Exparte Dale, 11 C.D. 772.

well-defined doctrine. You can, if the sale was rightful, take the proceeds of the sale, if you can identify them. If the sale was wrongful, you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds, if you can identify them. There is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds. But it very often happens that you cannot identify the proceeds. The proceeds may have been invested, together with money belonging to the person in a fiduciary position, in a purchase. He may have bought land with it, for instance, or he may have bought chattels with it. Now what is the position of the beneficial owner as regards such purchases? I will first of all take his position when the purchase is clearly made with what I will call, for shortness, the trust money, although it is not confined, as I will presently show, to express trusts. In that case, according to the now well-established doctrine of equity, the beneficial owner has a right to elect, either to take the property purchased, or to hold it as a security for the amount of the trust money laid out in the purchase; or, as we generally express it, he is entitled, at his election, either to take the property, or to have a charge on the property for the amount of the trust money. But in the second case, where a trustee has mixed the money with his own, there is this distinction, that the cestui que trust, or beneficial owner, can no longer elect

to take the property, because it is no longer bought with the trust money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase; and that charge is quite independent of the fact of the amount laid out by the trustee. The moment you get a substantial portion of it furnished by the trustee, the right to the charge follows (t). . . . I have only to advert to one other point, and that is this :- supposing, instead of being invested in the purchase of land or goods, the moneys were simply mixed with other moneys of the trustee, does it make any difference according to the modern doctrine of equity? I say none. It would be very remarkable if it were to do so. Supposing the trust money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but that is the effect of it. I have no doubt of it. It would make no difference if, instead of one sovereign, it was another 1,000 sovereigns. But if, instead of putting it into his bag, or after putting it into his bag, he carries the bag to his bankers, what then? According to law, the bankers are his debtors for the total amount; but if you lend the trust money to a

<sup>(</sup>t) See also, to same effect, Re Pumphrey, Worcester, &c. Banking Co. v. Blick, 22 C. D. 255, cited supra, p. 521.

third person you can follow it. If in the case supposed the trustee had lent the 1,000% to a man without security, you could follow the debt and take it from the debtor. . . . . If instead of lending the whole amount in one sum simply, he had added a sovereign, or had added 500% of his own to the 1,000%, the only difference is this, that instead of taking the debt, the cestuis que trusts would have a charge for the amount of the trust money on the debt."

6. A judgment creditor of a stockbroker obtained a garnishee order on a balance at a bank standing to the credit of the broker. All moneys in the bank to the broker's credit, were, in fact, moneus received for clients. Since money of a client had been paid in, drawings out in excess of the then balance had been made. And so in the case of another client. Except those two, there was no client who claimed any part of the fund. Held, on appeal, that as no part of the moneys in the bank was the debtor's own, the judgment creditor had no right against the balance; and that, it being clearly shown that the balance in hand was equal in amount to the sums remaining due from the broker to the two clients in question in respect of moneys of theirs paid into the account, and that there was no claim on behalf of any other client, the money belonged to these two clients (u). Where, however, a trustee has overdrawn his banking account, his bankers have a first and paramount lien on all moneys paid in if they have

<sup>(</sup>u) Hancock v. Smith, 41 C. D. 456.

no notice that they are trust moneys (x); for where the equities are equal the law prevails, and, in the case supposed, the bankers have in point of law received the money in payment of their debt.

7. As another example of the effect of mixing trust funds with the trustee's private moneys, the case of Cook v. Addison (y), may be cited. one Addison, who was the owner of a leasehold house, let it to S., as tenant, who covenanted to repair it. S. afterwards borrowed (legitimately) a sum of money from trustees, of whom Addison was one, and therewith purchased from Addison the furniture in the house, and executed a mortgage of his underlease, and a bill of sale of the furniture to the trustees. S. getting into difficulties, Addison put an end to the tenancy, and re-entered and took possession. He subsequently assigned the premises to Fowler at a rent of 3101., and a premium of 100%. The furniture was purchased by Fowler for 550l., and he also paid 250l. towards repairs. Addison invested a sum to make good the principal trust fund, but refused to pay the interest which had accrued due from S. It was held, however, that he had, by his conduct, mixed the trust funds with his own, and that the interest must be paid out of the sum received by him from Fowler for repairs.

8. Again, trustees had power, with the consent of the tenant for life, to sell the trust property,

<sup>(</sup>x) Thomson v. Clydesdale Bank, (1893) App. Cas. 282. (y) 17 Eq. 471.

and they were directed to invest the purchasemoney in the purchase of other real estate, to be settled on the like trusts. The trust property was sold under this power for 8,440/., and the tenant for life was allowed (wrongly) to keep the purchase-money. About the same time he purchased another estate for 17,400%, of which sum 8,124/. was part of the above-mentioned trust money. This estate was conveyed to him in fee simple. The tenant for life eventually became bankrupt, and it was held that, as against his assignees in bankruptcy, the original trustees of the settlement had a lien on the estate which he had purchased, to the extent of the moneys invested in its purchase (z).

9. No lien unless it can be shown that trust fund forms part of a specific fund or property.—However, wherever the trustee has mixed the trust fund with his own moneys, then, before a charge or lien can be substantiated, it must be shown that the trust fund in fact forms part of the fund or property on which the lien is claimed. Where, therefore, it appeared that the actual bank notes, of which the trust fund consisted, had not been paid by the trustee into his banking account, it was held that the cestuis que trusts had no lien on the balance lying at the trustee's bankers, because the trust fund could not be traced to the bank (a). Of course, if the trust fund could have

<sup>(</sup>z) Price v. Blakemore, 6 B. 507; and see also Hopper v. Conyers, 2 Eq. 549, and Middleton v. Pollock, 4 C. D. 49.
(a) Ex parte Hardcastle, 29 W. R. 615.

been proved to have been paid into the trustee's account, then, notwithstanding that he might subsequently have drawn out and paid in moneys, the lien would have been upheld.

ART. 74.—Any of the Beneficiaries may compel Performance of a neglected Duty or prevent the Commission of Breach.

Where the court is satisfied that trust property is in danger, either through the supineness (b) of, or a contemplated or probable active breach of duty (c) by, the trustees, or where the latter are residing out of the jurisdiction of the court (d), an injunction will be granted at the instance of any person with an existing, vested or contingent interest (e), either compelling the trustees to do their duty (f), or restraining them from interfering with the trust property (c), as the

<sup>(</sup>b) Foley v. Burnell, 1 B. C. C. 277; Fletcher v. Fletcher, 4 Ha. 78. (c) Tulbot v. Scott, 4 K. & J. 139; Middleton v. Dodswell,

<sup>13</sup> V. 266; Dance v. Goldingham, 8 Ch. App. 902.

<sup>(</sup>d) Noad v. Backhouse, 2 Y. & C. C. 529. (e) Lew. 697; Scott v. Becher, 4 Pr. 346; but see as to contingent cestuis que trusts, Davis v. Angel, 10 W. R. 723, and Clowes v. Hilliard, 4 C. D. 413.

<sup>(</sup>f) See note (b), supra.

case may require; and, if expedient, a receiver will be appointed (g).

ILLUST.—1. Right to use name of trustee in action at law.—Thus, if one commits some trespass upon lands in the possession of the trustee, and the latter refuses to sue him, the court will oblige him to lend his name for that purpose, on receiving a proper indemnity from the beneficiaries (h).

- 2. Trustee will be ordered to renew leases.—And so, if a tenant for life refuses to renew lease-holds, the court will compel him to do so, and a receiver of the income of the trust property will be appointed to collect a sufficient sum to pay the renewal fine (i).
- 3. Where same persons trustees under conflicting settlements.—In Earl Talbot v. Scott (k), lands were vested in trustees by act of parliament, upon trust for sale, and subject thereto, upon trusts inalienably annexing the rents to the Earldom of Shrewsbury. The Earl of Shrewsbury attempted to disentail (which of course he could not do effectually), and devised the lands to the same trustees, upon trust for a particular claimant of the title. The trustees accepted this trust, and claimed to receive the rents in that character, pending proceedings by the plaintiff to establish

<sup>(</sup>g) See cases in note (c); and Bennett v. Colley, 5 Sim. 192.

<sup>(</sup>h) Foley v. Burnell, supra.

<sup>(</sup>i) See Bennett v. Colley, supra, and Trustee Act, 1893,

<sup>(</sup>k) Supra.

his claim to the earldom. A receiver of the rents was, however, appointed on his application, upon the ground that the trusts of the will were in conflict with the prior trusts upon which they held the estate.

- 4. Beneficiaries may get a receiver appointed where property in danger .- So, in Evans v. Coventry (1), a bill was filed by a plaintiff insured in a society whose funds were liable to pay the insurance money, on behalf of himself and other persons so insured, charging a loss of the funds through the negligence of the directors. The answers and affidavits showed that the secretary had absconded with part of the funds, and that some of the directors were in needy circumstances, and the court granted an injunction restraining the directors from touching the funds, and appointed a receiver of them. Lord Justice Knight Bruce said: "The application before the court is founded on the common right of persons who are interested in property which is in danger, to apply for its protection. . . . In my judgment, the objections which have been urged against this application might be urged with as much reason, as much force, and as much effect, if this were an application to restrain the felling of timber in a case of waste, partly perpetrated and partly imminent"
- 5. On similar grounds, the court will appoint a receiver and grant an injunction where, from the

<sup>(</sup>l) 5 D., M. & G. 911.

character or condition of the trustee, he is not a fit person to have the control of the trust property; as, for instance, where he is insolvent (m), or about to become bankrupt (n), or is a person of dissolute habits, or dishonest (o).

6. Injunction granted to restrain improper sale. —Again, the court will grant an injunction to restrain a sale by trustees at an undervalue (p) (although this was at one time doubted (q)).

ART. 75.—Fraudulent Breach of Trust is a Crime.

A trustee who fraudulently appropriates or disposes of the trust property, in any manner inconsistent with the trust, is guilty of a misdemeanour, and is liable to a maximum punishment of seven years penal servitude; but no criminal proceedings can be instituted without the sanction of the Attorney-General, or of the Solicitor-General, or (if civil proceedings have

<sup>(</sup>m) Mansfield v. Shaw, 3 Mad. 100; Gladdon v. Stoneman, 1 Mad. 143, n.

<sup>(</sup>n) Re H.'s Estate, 1 C. D. 276.

<sup>(</sup>o) See Everett v. Prythergch, 12 Sim. 365.

<sup>(</sup>p) Anon., 6 Mad. 10; and see Webb v. Earl of Shaftesbury, 7 V. 488; Milligan v. Mitchell, 1 M. & K. 446; Dance v. Goldingham, 8 Ch. App. 902.

<sup>(</sup>q) Pechel v. Fowler, 2 Anst. 549.

been commenced) of the judge of the court wherein they have been commenced (r). The fact, that a breach of trust is a crime, does not affect the validity of any civil proceeding, nor any agreement for restoration of the trust property (s).

<sup>(</sup>r) 24 & 25 Vict. c. 96, s. 80. (s) Ibid., s. 86.

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#### CHAPTER II.

#### PROTECTION ACCORDED TO TRUSTEES.

- Art. 76. Protection against Breaches of Trust by co-Trustees.
  - ,, 77. Concurrence of or release by Beneficiaries.
    - 78. Statute of Limitations and Laches.
  - 79. Gainer by or instigator of Breach of Trust must, pro tanto, indemnify Trustee.

### \*ART. 76.—Protection against the Acts of Co-Trustee.

- (1) A trustee is not answerable for the receipts, acts, or defaults of his cotrustee (a), save only—
  - 2. Where he has handed the trust property to him without seeing to its proper application.
  - β. Where he allows him to receive the trust property without making due inquiry as to his dealing with it.
  - v. Where he becomes aware of a breach of trust, either committed

<sup>(</sup>a) Dawson v. Clarke, 18 V. 254; and as to settlements made since, see 22 & 23 Vict. c. 35, s. 31.

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or meditated, and abstains from taking the needful steps to obtain restitution and redress, or to prevent the meditated wrong.

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(2) Even in the above three cases he may, by express declaration in the settlement, be made irresponsible (b).

ILLUST.-1. Thus, in the case of Wilkins v. Hogg (c), which now governs the subject, a testatrix, after appointing three trustees, declared that each of them should be answerable only for losses arising from his own default, and not for involuntary acts or for the acts or defaults of his cotrustees; and particularly, that any trustee who should pay over to his co-trustees, or should do or concur in any act enabling his co-trustees to receive any moneys for the general purposes of her will, should not be obliged to see to the due application thereof, nor should such trustee be subsequently rendered liable by any express notice or intimation of the actual misapplication of the same moneys. The three trustees joined in signing and giving receipts to two insurance companies for two sums of money paid by them, but two of the trustees permitted their co-trustee to obtain

<sup>(</sup>b) As to the whole of the article, see judgment of Westbury, L.C., in Wilkins v. Hogg, 3 Giff. 116; 8 Jur. N. S. 25; and see also Dix v. Burford, 19 B. 409; Mucklow v. Fuller, Jac. 198; Brumridge v. Brumridge, 27 B. 5. (c) Supra.

the money without ascertaining whether he had invested it. This trustee having misapplied it, it was sought to make his co-trustees responsible; but Lord Westbury held that they were not. saying: "There are three modes in which a trustee would become liable according to the ordinary rules of law-first, where, being the recipient, he hands over the money without securing its due application; secondly, where he allows a co-trustee to receive money without making due inquiry as to his dealing with it; and thirdly, where he becomes aware of a breach of trust. either committed or meditated, and abstains from taking the needful steps to obtain restitution or The framer of the clause under examination knew these three rules, and used words sufficient to meet all these cases. There remained. therefore, only personal misconduct, in respect of which a trustee acting under this will would be responsible. He would still be answerable for collusion if he handed over trust money to his cotrustee with reasonable ground for believing or suspecting that that trustee would commit a breach of trust; but no such case as this was made by the bill."

2. In the recent case of *Pass* v. *Dundas* (d), the settlement contained a similar protective clause to that stated in the last illustration. Part of the trust estate consisted of a business, and one of the trustees authorized his co-trustee to draw money

<sup>(</sup>d) 29 W. R. 332.

out of the bank for the purposes of the business, which money the co-trustee misapplied. It was held that, under the words of the clause, the trustee was protected.

### ART. 77.—Concurrence of or Release by the Beneficiaries.

- (1) A beneficiary who has assented to, or concurred in, a breach of trust (e), or who has subsequently released or confirmed it (f), cannot afterwards charge the trustees with it: Provided
  - a. That the beneficiary was sui juris at the date of such assent or release (g);
  - B. That he had full knowledge of the facts and knew what he was doing (h), and the legal effect thereof (i);

(f) French v. Hobson, 9 V. 103; Wilkinson v. Parry, supra; Creswell v. Dewell, 4 Giff. 465.

(g) Underwood v. Stevens, 1 Mer. 717; Leach v. Leach, 10 V. 517; Lord Montford v. Cadogan, 19 V. 9.

(i) Re Garnett, Gandy v. Macauley, supra; Cockerill v.

<sup>(</sup>e) Brice v. Stokes, 11 V. 319; Wilkinson v. Parry, 4 Russ. 272; Nail v. Punter, 5 Sim. 555; Life Association of Scotland v. Siddal, 3 De G., F. & J. 58; Walker v. Symonds, 3 Sw. 64.

<sup>(</sup>h) Re Garnett, Gandy v. Macauley, 31 C. D. 1; Buckeridge v. Glass, 1 Cr. & Ph. 135; Hughes v. Wills, 9 Ha. 773; Cockerill v. Cholmeley, 1 R. & M. 425; Strange v. Fooks, 4 Giff. 408; Murch v. Russell, 3 M. & C. 31; Aveline v. Melhuish, 2 D., J. & S. 288.

- $\gamma$ . That no undue influence was brought to bear upon him in order to extort the assent or release (k).
- (2) A beneficiary, who is not sui juris, and who concurs in a breach of trust, cannot afterwards charge the trustees, if he employed fraud (l); but a married woman without power of alienation (m) cannot even by fraud estop herself from making the trustee primarily responsible; although under the circumstances stated in Article 79 she may be ordered by the court to indemnify him.

ILLUST.—1. Plaintiff party to breach of trust.—
Stock was settled on a married woman for her separate use for life, with a power of appointment by will. The trustees, at the instance of the husband, sold out the stock and paid the proceeds to him. The wife filed a bill to compel the trustees to replace the stock, and obtained a decree, under which the trustees transferred part of the

(k) Bowles v. Stewart, 1 Sch. & Lef. 226; Chesterfield v. Janssen, 2 V. 158.

(1) Lord Montford v. Cadogan, supra; Sharpe v. Foy, 4 Ch. App. 35; Re Lush, ibid, 591.

(m) Arnold v. Woodhams, 16 Eq. 33; Stanley v. Stanley, 7 C. D. 589.

Cholmeley, supra; Marker v. Marker, 9 Ha. 16; Burrows v. Walls, 5 D., M. & G., 254; Stafford v. Stafford, 1 D. & J. 202; Strange v. Fooks, supra.

stock into court, and were allowed time to retransfer the remainder. The wife then died, having by her will appointed the stock to the husband. He then filed a bill against the trustees, claiming the stock under the appointment, and praying for the same relief as his wife might have had. It is needless to say that his claim was promptly rejected (n).

- 2. Release.—A formal release under seal, or an express confirmation, will, of course, estop a beneficiary from instituting subsequent proceedings; and it would seem that any positive act or expression indicative of a clear intention to waive a breach of trust, will, if supported by valuable consideration (however slight), be equivalent to a release (o).
- 3. Infants incapable of release or acquiescence.

  —An infant cannot lose his right to relief, either by concurrence or release; for the law presumes that he has not the requisite discretion to judge.
- 4. Married women, how far capable of releasing or acquiescing.—Where property was settled, before the Married Women's Property Act, 1882, upon a married woman simply, and not to her separate use (in which latter case she is in the same position as a feme sole (p)), or where it is

<sup>(</sup>n) Nail v. Punter, 5 Sim. 555.

<sup>(</sup>o) See Stackhouse v. Barnston, 10 V. 456; per Sir W. Grant; and Farrant v. Blanchford, 11 W. R. 178.

(p) Brewer v. Swirles, 2 Sm. & G. 219; Fletcher v. Green,

<sup>(</sup>p) Brewer v. Swirles, 2 Sm. & G. 219; Fletcher v. Green,
33 B. 426; Butler v. Compton, 7 Eq. 16; Jones v. Higgins,
2 Eq. 538; Taylor v. Cartwright, 14 Eq. 175.

settled to her separate use but she is restrained from alienating or anticipating it (q), she is not competent to consent to, or to release, a breach of trust: and her concurrence or release would, at all events before the passing of the Trustee Act, 1888, afford no protection to the trustee, except in cases falling within the provisions of 3 & 4 Will. 4, e. 74, or 20 & 21 Vict. c. 57. For instance, where money was, prior to 1883, settled upon a husband for life, with remainder to his wife for life or absolutely, her concurrence in a breach of trust during the life of her husband had no effect, unless testified by a duly acknowledged deed made with the approbation of her husband. Neither would it even now, if she were entitled for her separate use and were restrained from anticipation; for, as was said by Vice-Chancellor Malins in Stanley v. Stanley (r), "In no case, and by no device whatever, can the restraint upon anticipation be evaded." However, this dictum is no longer strictly accurate, because, by section 45 of the Trustee Act, 1893 (which re-enacts section 6 of the Act of 1888), the court may, if it thinks fit, impound the interest of a married woman restrained from alienation, who has instigated, or consented in writing to a breach of trust, for the purpose of indemnifying the trustee. It is somewhat curious, that, although the act gives the court this discretionary power of indemnifying the trustee, it does not

 <sup>(</sup>q) Stanley v. Stanley, 7 C. D. 589.
 (r) Supra.

enable the trustee to set up the instigation or consent as a *defence*. It is conceived, therefore, that if such an one were to sue a trustee to replace the trust fund, he would have no defence, and must replace it, trusting, however, to be indemnified out of the lady's interest.

The danger incurred by trustees who listen to the supplications of married women who are restrained from anticipation, was very vigorously pointed out by Lord Langdale in Tyler v. Tyler (s), in a passage which ought to be learnt by heart by every trustee. "We find," said his lordship, "a married woman throwing herself at the feet of the trustee, begging and entreating him to advance a sum of money out of the trust fund, to save her husband and her family from utter ruin, and making out a most plausible case for that purpose. His compassionate feelings are worked upon, he raises and advances the money; the object for which it was given entirely fails, the husband becomes bankrupt, and in a few months the very same woman who induced the trustee to do this, files a bill in the Court of Chancery to compel him to make good that loss to the trust. These are cases which, when they happen, shock everybody's feelings at the time; but it is necessary that relief should be given in such cases, for if relief were not given, and if such rights were not strictly maintained, no such thing as a trust could ever be preserved."

<sup>(</sup>s) 3 B. 563.

5. A married woman is, however, legally responsible for a fraud, and her ordinary incapacity will not avail her; but if the property were settled upon her without power of anticipation, her fraud will not prejudice her (t). A settlement was made on the marriage of a female infant, whereby the husband covenanted to induce her to settle her real estate upon attaining twenty-one, and to concur in such settlement himself. He neglected to do so, however, and they subsequently mortgaged the real estate, but the mortgagee had no notice of the covenant until just before the deed was acknowledged. It was held, that the wife's fraud in not disclosing the existence of the settlement bound her estate, and bound her not to consent to the settlement which the husband had covenanted that he would induce her to make (u).

ART. 78.—Statute of Limitations, and Laches.

(1) In the case of actions or other proceedings for breach of trust commenced after the 1st January, 1890, (except where the claim is founded upon fraud, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received

(t) Stanley v. Stanley, supra.

. . .

<sup>(</sup>u) Sharp v. Foy, 4 Ch. App. 85; and see Re Lush, ibid. 591.

by him and converted to his own use,) the following provisions apply, viz:—

- $\alpha$ . All rights conferred by any statute of limitations apply to the same extent as if the trustee or person claiming through him had not been a trustee (x).
- B. If the action or other proceeding is brought to recover money or other property, and is one to which no other statute of limitations applies, the trustee or person claiming through him, may plead the lapse of six years since the breach, in bar of the plaintiff's claim. This may be pleaded not merely against persons sui juris, but also against married women who are restrained from alienation; but the six years does not commence to run against a beneficiary until his interest is an interest in possession (y).
- v. No beneficiary as against whom the statute would be a good defence, can

<sup>(</sup>x) Trustee Act, 1888, sect. 8, sub-sect. 1 (a). It is understood that this section will shortly be repealed and re-enacted as one of the sections of a consolidation limitation Act. It is for this reason that it was not inserted in the Trustee Act, 1893.

(y) Ibid., sub-sect. 1 (b).

derive any greater or other benefit under a judgment or order obtained by another beneficiary, than he could have obtained if he had himself been plaintiff (z).

(2) Apart from the above statutory protection, in taking an account for the purpose of charging a trustee with personal liability, every fair allowance ought to be made in his favour, if it can be shown that he acted bonâ fide, and that the claim sought to be enforced is one which arose many years ago, of the nature and particulars of which the beneficiary was, at the time when it arose, perfectly cognizant, and which he has taken no steps to enforce (a).

The law on the subject prior to 1890.—Prior to the year 1890, the law on this subject was as follows:-

The Statutes of Limitation did not apply to declared trusts (b) (except where they were created

<sup>(</sup>z) Trustee Act, 1888, sect. 8, sub-sect. 2.
(a) Per Westbury, L.C., in McDonnell v. White, 11 H. L. C. 570; Thompson v. Eastwood, 2 App. Cas. 215; Bright v. Legerton, 2 D. F. & J. 606.

<sup>(</sup>b) 3 & 4 Will. 4, c. 27, s. 25, and Jud. Act, 1873; and see also 37 & 38 Vict. c. 57, s. 10, and Judicature Act (Irish), s. 28, sub-s. 2; Edwards v. Warder, 1 App. Cas. **281.** 

by way of a charge on real estate (c), unconnected with a duty (d)), nor to trusts which, on the face of a written instrument, were resulting trusts (e), nor to trusts created by the court (f), although they were applicable to other constructive trusts (g), and to legacies which were not vested in the executor on express trusts (h). But fair allowance was made in a trustee's favour if it could be shown that he acted bonâ fide, and that the claim sought to be enforced was one which arose many years ago, of the nature and particulars of which the beneficiary was, at the time when it arose, perfectly cognizant, and which he had taken no steps to enforce (i).

The new law.—This state of the law was, however, considered to press so hardly upon trustees, that it was enacted by the eighth section of the Trustee Act, 1888, as follows:—

(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still

(d) 3 & 4 Will. 4, c. 27, s. 40.

(f) Seagram v. Tick, 18 C. D. 296. (g) Beckford v. Wade, 17 V. 97; Petre v. Petre, 1 Dr. 371.

(h) Re Davis, Evans v. Moore, (1891) 3 Ch. 119; Re Barker, Buxton v. Campbell, (1892) 2 Ch. 491.

(i) See per Westbury, L. C., in McDonnell v. White, 11 H. L. C. 570; Thompson v. Eastwood, 2 App. Ca. 215; Bright v. Legerton, 2 D. F. & J. 606.

<sup>(</sup>c) Banner v. Berridge, 18 C. D. 254; Fearnside v. Flint, 22 C. D. 519; Hughes v. Coles, 27 C. D. 231.

<sup>(</sup>e) Salter v. Cavánagh, 1 Dr. & W. 668; Mutlow v. Bigg, 18 Eq. 246.

retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

- (a) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:
- (b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him. in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.
- (2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.
- (3.) This section shall apply only to actions or other proceedings commenced after the first day of January, one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations.

Difficulty in construing new Act.-The new section is no doubt intended to completely revolutionize the law, but it is unfortunately by no means free from ambiguity. Indeed, it is extremely difficult to understand what paragraph (a) of sub-sect. (1) was aimed at. It could not have been aimed at claims for the recovery of land or other property, or the proceeds thereof retained by the trustee personally, because such claims are expressly excluded. Nor could it have been aimed at claims against purchasers from the trustee with notice of a breach of trust, because such claims are already provided for by the 25th section of 7 Will. 4 & 1 Vict. c. 28. Nor, it is conceived, could it have been intended to apply to actions for what may be called negligent breaches of trust, or breaches arising from mistake or the like, because such actions are for equitable wrongs sui generis arising neither out of tort or contract, and not falling within the provisions of any existing Statute of Limitations (j); indeed, such claims are obviously intended to be provided for by paragraph (b). But it is difficult to conceive what other claims than those above enumerated could be made against a trustee as such. Until judicial ingenuity shall solve the problem, it would seem that the meaning of sub-sect. 1, paragraph (a) must remain locked up in the breast of the learned framer of the act. The conundrum has proved too tough for Lord Justice Fry (k), and it

<sup>(</sup>j) See Re Bowden, Andrew v. Cooper, 45 C. D. 444.(k) Ibid.

would seem likely that paragraph (b) will be the only really effective paragraph of this very obscure enactment.

ILLUST.—1. Failure to convert according to imperative direction.—Trustees, in breach of trust, carried on a testator's business until the youngest child attained twenty-one, in the year 1882, when they sold everything, and divided the proceeds between all the children. In 1890, one of these children commenced an action seeking to make the trustees liable for a loss incurred through carrying on the business. It was held, however, that it was not an action for a legacy to which twelve years was a bar under 37 & 38 Vict. c. 57, s. 8, but an action for breach of trust to which no existing statute of limitations applied prior to 1890, and that, consequently, under the act of 1888, sect. 8, sub-sect. 1 (b), the lapse of six years was a bar (l).

- 2. The whole fund expended in maintenance.—Where property was held in trust for an infant on attaining twenty-one (which he did in 1880), and in 1892 he sued the trustee for an account, and the trustee deposed that he had (which was not contradicted) expended the entire fund in the maintenance and education of the infant, it was held that the Act of 1888 barred any claim to an account or other relief (m).
  - 3. Mortgage of insufficient value.-In August,

 <sup>(1)</sup> Re Swain, Swain v. Bringeman, (1891) 3 Ch. 233.
 (m) Re Page, Jones v. Morgan, (1893) 1 Ch. 304.

1878, trustees committed an innocent breach of trust, by investing on mortgage of property of insufficient value. The mortgagee paid interest direct to the tenant for life until 1890. In 1892, the tenant for life and infant remainderman brought an action to compel the trustees to make good the amount invested, and it was conceded that, quà the remainderman, they had no defence. It was, however, held, that, quà the tenant for life, his right to complain was barred at the expiration of six years from the date of the investment, that being the date of the breach of trust (n). Consequently, although the trustees were ordered to make good the loss to the estate, they were allowed to receive the income of so much as represented the loss during the life of the tenant for life.

- 4. How far the act applies where trustee has remotely benefited by breach.—The exceptions in sect. 8 of the Act of 1888, do not prevent a trustee having the benefit of the statute, because the trust fund advanced on an insufficient security, was, in fact, applied by the borrower in payment of a debt to his bankers, of whom the trustee was one (o).
- 5. How far statute applicable to illegal trust.—
  It has been held by Mr. Justice Kekewich that trustees of a void charitable conveyance, if in possession for twelve years, gain a title by the

<sup>(</sup>n) Re Somerset, Somerset v. Earl Poulett, (1894) 1 Ch. 231.
(o) Re Gurney, Mason v. Mercer, (1893) 1 Ch. 590.

ordinary Statute of Limitations, on the ground that the express trust was illegal, and that the resulting trust, although discoverable on the face of the settlement, was inconsistent with it (p). But on the other hand, in Patrick v. Simpson (q), where there was a resulting trust depending, not on the illegality, but on the absence of an express trust, it was held that the trustee could not retain the property and plead the statute. However, a resulting or other constructive trust depending upon evidence outside the written instrument, was always within the Statutes of Limitation (r). Therefore, a tenant for life of leaseholds who renews in his own name (s), or a mortgagee in possession (even although the mortgage be in the form of a trust (t), is entitled to plead the statute and keep the property.

6. Trust apparently constructive, but really express.-However, although as a general rule constructive trustees can avail themselves of the statute while keeping the property for their own benefit, the mere fact that a person is called an agent instead of a trustee, does not confer on him the statutory protection accorded to constructive trustees, if he was, in fact, expressly trusted with money or property for a particular

 <sup>(</sup>p) Churcher v. Martin, 42 C. D. 312.
 (q) 24 Q. B. D. 128, following Salter v. Cavanagh, 1
 D. & Wal. 668.

<sup>(</sup>r) Beckford v. Wade, 17 V. 97.
(s) Petre v. Petre, 1 Dr. 371.
(t) Locking v. Parker, 8 Ch. App. 30.

purpose; for in that case he becomes an express trustee (u).

- 7. Statute has no application where there has been a false statement made.—The statute affords no defence to an action against a firm of solicitors who have falsely told their client that money which he had intrusted to them for investment had been, in fact, invested on mortgage, the truth being that a clerk of the solicitors had embezzled it (x).
- 8. Charges.—Simple charges are expressly provided for by the statute (y). Where, however. a charge is so coupled with a trust as to be in reality a trust itself, the old statutes did not apply. For instance, where a testator charged his property with payment of his debts, and imposed an obligation on the devisee to exert himself actively in paying the debts, the case did not fall within the old statute (z); and it is conceived that it would not fall within the provisions of the new Act.
- 9. Laches.—As has been stated, even before the Act of 1888, a beneficiary under a declared trust might disentitle himself to relief by great laches. Thus A., being greatly in debt, executed a deed of trust for the benefit of his creditors, and among the property was the benefit of a lease for lives, renewable for ever, on which the rent reserved was a high rack rent. The tenant under this

<sup>(</sup>u) See Burdick v. Garrick, 5 Ch. App. 233; Foley v. Hill, 2 H. L. C. 28; and Re Bell, Lake v. Bell, 34 C. D.

<sup>(</sup>x) Moore v. Knight, (1891), 1 Ch. 547. (y) 3 & 4 Will. 4, c. 27, s. 40. (z) Hunt v. Bateman, 10 Ir. Rep. Eq. 360.

lease complained, and the trustee, with the knowledge, but without the consent of A. (but with the consent and approbation of A.'s brother, who had the management of A.'s affairs), accepted a reduced rent. A. complained of the abatement, but took no steps to put an end to it for some years. It was held that after the expiration of the trust, the trustee could not be called upon to make up the deficiency (a).

10. So where, with full knowledge of a breach of trust, no step was taken for thirty-eight years, it was held that the beneficiaries had lost their right to make any claim (b).

11. Laches not always a bar.—But, although long acquiescence is a bar to relief, the reason for holding so is, that the fact of lying by for a considerable period, is evidence of an *intention* or election on the part of the beneficiary, not to exercise his strict rights. Consequently, where the circumstances are such as to afford no ground for any such presumption, long acquiescence will be no bar to relief unless the statute is applicable (c).

12. Inconvenience of relief after long delay.— However, apart from intention, wherever it is for the general convenience that a suit in respect of a

<sup>(</sup>a) McDonnell v. White, supra.

<sup>(</sup>b) Sleeman v. Wilson, 13 Eq. 36; and see also Jones v. Higgins, 2 Eq. 538.

<sup>(</sup>c) See and consider Re Cross, Harston v. Tenison, 20 C. D. 109; and see also Farrant v. Blanchford, 11 W. R. 178.

long dormant grievance should be disallowed, the court will refuse relief on the ground that "Expedit reipublica ut sit finis litium." For instance, where a plaintiff seeks to set aside a purchase obtained from him by his solicitor, a delay of less than twenty years may bar the right to relief, if it would be inconvenient to grant it (d). So where, in an action for an account, the plaintiff by lying by has rendered it impossible or very inconvenient for the defendant to render the account, he will get no relief (e).

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ART. 79.—Trustees generally entitled to contribution inter se, but may be entitled to be indemnified by co-trustee or beneficiary who instigated breach.

(1) As a general rule, where several trustees have been guilty of a breach of trust not amounting to actual fraud (f), those who are obliged to pay, will be entitled to exact contribution from the others (g); and

<sup>(</sup>d) Gresley v. Mousley, 4 D. & J. 78. (e) See per Lord Alvanley, in Pickering v. Stamford, 2 V. 272; and see also Clegg v. Edmonston, 3 Jur. N. S. 299; Tatam v. Williams, 3 Ha. 347.

<sup>(</sup>f) Att.-Gen. v. Wilson, supra; see Lingard v. Bromley, 1 V. & B. 114; Tarleton v. Hornby, 1 Y. & C. 336.

<sup>(</sup>g) Lingard v. Bromley, supra; Birks v. Micklethwaite, 33 B. 409; Att.-Gen. v. Dangars, ibid. 624. This claim to contribution is now considered a specialty debt: 19 & 20 Vict. c. 97.

such contribution may be ordered in the action in which the liability was established (h).

(2) Where, however, one of several trustees has been guilty of fraud, or has otherwise benefited by the breach, or has been the confidential solicitor of his co-trustees, he may have to indemnify them and to bear the whole loss himself (i).

(3) Where a trustee commits a breach of trust at the instigation or request (k) or with the consent in writing of a beneficiary, the court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the court seems just, for impounding all or any part of the interest of the beneficiary in the trust

<sup>(</sup>h) Priestman v. Tindall, 24 B. 244.
(i) Bahin v. Hughes, 31 C. D. 390; Blyth v. Fladgate, (1891) 1 Ch. at p. 365; Featherstone v. West, 6 Ir. Rep. Eq. 86; Lockhart v. Reilly, 25 L. J., Ch. 697; Thompson v. Finch, 22 B. 316; 8 D. M. & G. 560; and see Butler v. Butler, 7 C. D 116.

<sup>(</sup>k) The request need not be in writing, although a mere consent must be: per Kekewich, J., in Griffiths v. Hughes, (1892) 3 Ch. 105; and per Lindley, L. J., in Re Somerset, Somerset v. Lord Poulett, (1894) 1 Ch. 231.

estate by way of indemnity to the trustee or person claiming through him(l).

TLLUST.-1. Contribution between trustees.-A loss was suffered by the creditors of a bankrupt through the joint default of the assignees in bankruptcy. A decree was made against them, and one of them had to make the loss good. Contribution was, however, enforced against his coassignees. Sir W. Grant, M.R., saying: "Where entire damages are recovered against several defendants guilty of a tort, a court of justice will not interfere to enforce contribution amongst wrong-doers; but here there is nothing but the non-performance of a civil obligation. The liability is not ex delicto unless every refusal to comply with a legal obligation makes a party guilty of a delictum " (m).

2. Lien of trustee made liable on costs awarded to co-trustee.—So where a large balance was found to be due jointly from a trustee and the representatives of a deceased co-trustee (n), but costs

<sup>(1)</sup> Trustee Act, 1893, sect. 45. This section applies to breaches of trust whenever committed, but not so as to prejudice any question in any proceeding which was pending on the 24th of December, 1888, and is still pending (sub-sect. 2).

<sup>(</sup>m) Lingard v. Bromley, supra. As to contribution by directors of a company where one of them has been made responsible for a breach of trust in misapplying the company's assets, see Ramskill v. Edwards, 31 C. D. 100.

<sup>(</sup>n) It need scarcely be pointed out that the representa-

were given to both out of the trust estate, it was held (the estate of the deceased co-trustee being quite insolvent, and therefore unable to contribute) that the surviving trustee, upon paying the whole of the loss, was entitled to a lien for half of it on the costs awarded to the representatives of his deceased co-trustee (o).

3. How far a more guilty trustee is bound to indemnify his less guilty co-trustees.-In Bahin v. Hughes (p), Cotton, L. J., said:—"On going into the authorities there are very few cases in which one trustee who has been guilty with a co-trustee of breach of trust, and held responsible, has successfully sought indemnity as against his cotrustee. Lockhart v. Reilly (q), and Thompson v. Finch (r), are the only cases which appear to be reported. Now, in Lockhart v. Reilly, it appears from the report of the case in the Law Journal, that the trustee by whom the loss was sustained had been not only trustee, but had been and was a solicitor, and acting as solicitor for himself and his co-trustee, and it was on his advice that Lockhart had relied in making the investment which gave rise to the action of the cestui que trust.

tives of a deceased trustee are not liable for a breach of trust committed after his death, where he has left the trust fund in a proper state of investment (Re Palk, 41 W. R. 28). Of course, they may be liable where he has not so left it: Gibbins v. Taylor, 22 B. 344.

<sup>(</sup>o) Fletcher v. Green, 33 B. 515. (p) 31 C. D. 390, 394. (q) 25 L. J., Ch. 697. (r) 22 B. 316; 8 D., M. & G. 560.

The Lord Chancellor [Lord Cranworth] refers to the fact that he was a solicitor, and makes this remark: 'the whole thing was trusted to him. He was the solicitor, and, independently of the consideration that one cannot help seeing it was done with a view of favouring his own family, yet, if that had not been so, the co-trustee leaves it with the solicitor trustee, by whose negligence (I use no harsher word) all this evil, in a great degree, has arisen.' Therefore the Lord Chancellor in giving his decision relies upon the fact of the trustee being a solicitor. In Thompson v. Finch a right was conceded to prove against the estate of the deceased trustee for the full loss sustained; but it appears that in this case also he was a solicitor, and that he really took this money to himself, for he mixed it with his own money and invested it on a mortgage; and, therefore, it was held that the trustee was entitled to indemnity from the estate of the co-trustee who was a solicitor. . . . Of course where one trustee has got the money into his own hands, and made use of it, he will be liable to his co-trustee to give him an indemnity (s). Now I think it wrong to lay down any limitation of the circumstances under which one trustee would be held liable to the other for indemnity, both having been held liable to the cestui que trust; but so far as cases have gone at present, relief has only been granted against a

<sup>(</sup>s) See Featherstone v. West, 6 Ir. Rep. Eq. 86. q q 2

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trustee who has himself got the benefit of the breach of trust, or between whom and his cotrustees there has existed a relation, which will justify the court in treating him as solely liable for the breach of trust."

- 4. Secus, where one only remotely benefited .-However, one trustee will not have to indemnify his co-trustees where his breach of trust is only remotely connected with the loss, unless, of course, he was guilty of actual fraud. Thus, in Butler v. Butler (t), two trustees advanced money to a builder on mortgage. The land had belonged to the defendant, one of the trustees, and part of the money advanced was applied by the builder in payment of the price of the land, and of other money due from him to the defendant. other trustee commenced this action, alleging that the security was insufficient, and asking that it might be realized, and that the defendant might make good any deficiency. It was, however, held, that the indirect benefit which a creditor gets from trust moneys being lent to his debtor upon insufficient security, is too remote (unless the thing was a fraudulent scheme) to render him solely liable to make good the loss.
- 5. Breaches of trust committed at the instigation, or request, or with consent of beneficiaries.—Prior to the Act of 1888, the law as to the right of trustees to be indemnified for breaches of trust

<sup>(</sup>t) 7 C. D. 116; and see also, as to non-liability of a trustee for remote gain, Whitney v. Smith, 4 Ch. App. 513.

by those who instigated such breaches was, it is conceived, as follows, viz.:—

- (1.) As between the trustees and a person who knowingly instigated a breach of trust (u), or who reaped the benefit of one, the latter was bound to indemnify the former to the extent of the property actually received by him, or by some other person at his request, in consequence of the breach (x).
- (2.) Where the instigator was a beneficiary, the trustees would have a lien on his share for such amount (y).
- (3.) Where the instigator was a married woman entitled for her separate use, the onus lay on the trustees of showing that she acted for herself in the matter, and was fully informed of the state of the case (z). But where she was restrained from anticipation, the trustees could acquire no lien on her interest (a).

The 45th section of the Trustee Act, 1893 (which is a re-enactment of the 6th section of the Act of 1888), makes the following important modifications in the law, viz.:—

(1.) The absolute protection formerly given to

<sup>(</sup>u) See Sawyer v. Sawyer, 28 C. D. 595; Ryder v. Bickerton, 3 Sw. 80, n.

<sup>(</sup>x) Lew. 744; Raby v. Ridehalgh, 7 D., M. & G. 108; Trafford v. Boehm, 3 Atk. 440; Lord Montford v. Lord Cadogan, 19 V. 639; Brown v. Maunsell, 5 Ir. Ch. R. 351; Walsham v. Stainton, 1 H. & M. 337.

<sup>(</sup>y) Prime v. Savell, W. N. 1867, p. 227.

<sup>(</sup>z) Sawyer v. Sawyer, supra.

<sup>(</sup>a) Stanley v. Stanley, 7 C. D. 587.

a married woman restrained from anticipation who instigates a breach of trust is removed, and the court is *empowered* (not required) to impound her interest to indemnify the trustees (b).

(2.) A mere request (as distinguished from instigation) will be sufficient to enable the court to give the trustee relief, and the re-

quest need not be in writing (c).

(3.) The section does not restrict the trustee's indemnity to the amount by which the beneficiary benefited by the breach of trust, but apparently the court may extend the indemnity to the entire interest of the beneficiary.

6. To render beneficiary liable to indemnify trustee, he must have known that act was a breach of trust.—In order to make a beneficiary liable under sect. 45 of the Act of 1893, he must not only have instigated or requested or consented in writing to the breach, but must also have known the facts which would render what was done a breach of trust. Thus, where a tenant for life undeniably requested trustees to invest the trust fund on a certain security, but it did not appear

<sup>(</sup>b) How important this is may be seen from a perusal of the observations of Lord Langdale in Tyler v. Tyler, 3 Bea. 563. For an instance of a case in which the new power has been acted on, see Griffiths v. Hughes, (1892) 3 Ch. 105; and for one in which it was not, see Ricketts v. Ricketts, 64 L. T. 263.

(c) Per Kekewich, J., Griffiths v. Hughes, supra.

that he intended to be a party to a breach of trust, and in effect he left it to the trustees to determine whether the security was a proper one for the sum to be advanced, it was held that the trustees could not impound his life interest to make good the breach (d). But if the tenant for life had been proved to have knowingly requested the breach of trust, the decision would (even before the statute) have been otherwise (e).

7. Guilty knowledge must be conclusively proved in the case of a married woman.—It is conceived that in the case of a married woman, the court will require even stricter proof of her guilty knowledge than in the case of a man. As was said by Fry, L.J., in Sawyer v. Sawyer (f), "The substance of the transaction is a charge created by a cestui que trust in favour of a trustee by way of indemnity against a breach of trust committed by him. The primary duty of the trustee was the protection of the fund which he did not protect, and before a trustee can claim the benefit of any charge or right of retainer against the interest of a married woman in the fund, it appears to us to be reasonable that he should show that the charge,

<sup>(</sup>d) Re Somerset, Somerset v. Earl Poulett, (1894) 1 Ch. 231.

<sup>(</sup>e) Raby v. Ridehalgh, 7 D., M. & G. 108.

(f) 28 C. D. 595; but see Griffiths v. Hughes, (1892) 3 Ch. 105, in which Mr. Justice Kekewich impounded the income of a married woman restrained from anticipation. But quære whether that was consistent with Re Somerset. On the other hand, conf. decision of Bowen, L.J., in Ricketts v. Ricketts, 64 L. T. 263.

or right of retainer, was created by her with a full knowledge of all the circumstances. It is probable that, in the case of a man of full years, the court would presume him so to be acting; but in the case of a feme covert, we do not think the presumption exists in favour of the trustee, whose primary duty was to protect the fund for her benefit. . . . All the cases in which the separate estate of a married woman has been held to be affected by a breach of trust are, so far as we are aware, cases in which she has been an actual actor in the transaction herself: such are the cases of Crosby v. Church (g), Clive v. Carew (h), and Pemberton v. Gill (i). In no case, so far as we know, has her separate estate been charged on the mere ground of her having acquiesced in or approved of the breach of trust."

8. Where trustees have wrongfully parted with trust fund to trustees of subsidiary settlement.-Where trustees, at the request of a beneficiary, advance the trust fund to her, with notice that she has settled it by another settlement, they cannot impound her income under such other settlement, because that income is not the interest of a beneficiary in the trust estate of which they are the trustees (k).

<sup>(</sup>g) 3 B. 485. (h) 1 J. & H. 199. (i) 1 Dr. & Sm. 266.

<sup>(</sup>k) Ricketts v. Ricketts, 64 L. T. 263.

## CHAPTER III.

## LIABILITY OF THIRD PARTIES AND BENEFICIARIES.

ART. 80. Liability of Third Parties or Beneficiaries who are Parties to a Breach of Trust.

,, 81. Following Trust Property into the Hands of Third Parties.

ART. 80.—Liability of Third Parties or Beneficiaries who are Parties to a Breach of Trust.

(1) All persons who meddle with trust funds, or mix themselves up with a breach of trust, become trustees by construction of equity, and render themselves equally liable with the trustees, both in relation to primary liability, and to the limitation of the right of pleading the statutes of limitation (a).

Notes

<sup>(</sup>a) Re Barney, Barney v. Barney, (1892) 2 Ch. 265; Blyth v. Fladgate, (1891) 1 Ch. 337; Lee v. Sankey, 15 Eq. 204; Rolfe v. Gregory, 11 Jur., N. S. 98; Bridgeman v. Gill, 24 B. 302; Eaves v. Hickson, 30 B. 136; Morgan v. Elford, 4 C. D. 352; Dixon v. Dixon, 9 C. D. 587.

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- (2) Where such a person has a partial equitable interest in the trust property, whether original or derivative (b), it may be stopped by his co-beneficiaries, not only as against him personally (c), but as against all persons claiming under him, including (semble) purchasers for value without notice (d). But where he takes a legal, as distinguished from an equitable interest under the same settlement, that cannot be touched (e).
- (3) This article has no application where the guilty party is a married woman restrained from anticipation (f).

ILLUST. 1.—Trust fund lent to tenant for life.—A trustee, in breach of trust, lends the trust fund to the tenant for life. Here both the trustee and

But of course the rule does not apply to persons who, without notice of a trust, deal with trust property in a manner inconsistent with it: Williams v. Williams, 17 C. D. 437.

<sup>(</sup>b) Jacubs v. Rylance, 17 Eq. 351; Doering v. Doering, 42 C. D. 203.

<sup>(</sup>c) Woodyatt v. Gresley, 8 Sim. 180; Fuller v. Knight, 6 B. 205; M'Gachen v. Dew, 15 B. 84; Vaughton v. Noble, 30 B. 34; Jacubs v. Rylance, 17 Eq. 341.

<sup>(</sup>d) Jacubs v. Rylance, supra, and Doering v. Doering, supra.

<sup>(</sup>e) Egbert v. Butter, 21 B. 560; Fox v. Buckley, 3 C. D. 508; but see Woodyatt v. Gresley, supra.

<sup>(</sup>f) Stanley v. Stanley, 7 C. D. 589.

the tenant for life, who has got the trust funds into his own hands by a breach of trust to which he was himself a party (g), will be jointly and severally liable to the beneficiaries.

- 2. Third party with notice of breach is liable.— A testator bequeathed a sum of 600%, (which he described as being in the hands of one Gregory, to whom he had lent the same on the security of his note of hand,) to his son-in-law Rolfe, upon trust to invest the same, and pay the dividends and interest to his daughter, the wife of Rolfe, for life, for her separate use; and after her death upon trust for Rolfe for life, with remainder to their children. On the death of the testator, Rolfe, the trustee, became indebted to Gregory, and in order to discharge part of that debt he delivered to Gregory the note of hand for 600l. It was held that as Gregory had information of the manner of the bequest he was a party to the fraudulent abstraction of the trust property, and liable to refund the amount, and that being founded on fraud, the Statute of Limitations did not apply (h).
- 3. Bankers with notice of trust fund.—So, where a fund was standing to the account of two trustees in the books of some bankers, who had notice that it was a trust fund, and by the direction of the tenant for life only, they transferred it to his account, and thereby obtained payment of a debt due from him to them, it was held that the

 <sup>(</sup>g) Cowper v. Stoneham, 68 L. T. 18.
 (h) Rolfe v. Gregory, supra; Dixon v. Dixon, 9 C. D.

trustees might sue the bankers to have the trust fund replaced, and that the Statute of Limitations was not applicable (i).

- 4. Trust fund paid to wrong person on faith of forged certificate.—In Eaves v. Hickson (j) trustees had paid over trust funds bequeathed to the children of one William Knibb, upon the faith of a forged marriage certificate, which William Knibb produced to them, from which it appeared that certain illegitimate children of his were legitimate. It was held that William Knibb, who had produced the certificate, must be made responsible for the money as well as the trustees.
- 5. Trustee de son tort.—In general, beneficiaries may proceed against an agent of their trustee where he has not confined himself to the duties of an agent, but, by accepting a delegation of the trust (k), or by fraudulently mixing himself up with a breach of trust, he has himself become a trustee by construction of equity (l). It is, however, essential to the character of a trustee de son tort, that he should have trust property either actually vested in him, or so far under his control, that he is in a position to require that it should be vested in him (m). Thus, where the capital

<sup>(</sup>i) Bridgeman v. Gill, 24 B. 302.

<sup>(</sup>j) 30 B. 136.

<sup>(</sup>k) Cowper v. Stoneham, 68 L. T. 18.

<sup>(</sup>l) Re Barney, Barney v. Barney, (1892) 2 Ch. 265. (m) Ibid., and see Blundell v. Blundell, 40 C. D. 370. Solicitors who prepare deeds relating to contemplated technical breaches of trust but advise against their execution, are not liable if they have no reason to suspect dishonesty (Barnes v. Addy, 9 Ch. App. 244).

of a trust fund having got into the hands of the trustee's solicitor, was, through his intervention, spent by the trustee, the solicitor was held liable (n); for where trust funds come into the custody and under the control of a solicitor, or indeed of anyone else, with notice of the trusts, he can only discharge himself of liability by showing that the property was duly applied in accordance with the trusts (o). It is not sufficient, for example, to show that the solicitor invested it by the direction of the trustees in an unauthorized investment (p), nor that he paid it to one of several trustees who misappropriated it (q). Of course, however, a solicitor would be justified in paying it to the whole of the trustees jointly.

6. Solicitor knowingly assisting in getting fund in court paid to wrong person.—If a solicitor, knowing that money which is in court belongs to one person, commences proceedings in the name of another, and obtains payment to such other, he is personally chargeable with the amount. Nay, even if he has not actual knowledge of the falseness of the claim, but has knowledge of circumstances which, if duly considered, would lead to a knowledge of the truth, he will be made personally responsible for the loss which his want of consideration may cause (r).

<sup>(</sup>n) Morgan v. Stephens, 3 Giff. 226. (o) Blyth v. Fladgate, (1891) 1 Ch. 337.

<sup>(</sup>p) Blyth v. Fladgate, supra. (q) Lee v. Sankey, 15 Eq. 204. (r) Ezort v. Lister, 5 B. 585; Todd v. Studholme, 3

- 7. Solicitor receiving and retaining trust money.—Again, where a solicitor receives trust moneys on payment off of a mortgage, and retains them, he is, quà the statutes of limitation, in the position of an express trustee who, as has been stated above, can never plead the statutes in respect of money which he has received and converted to his own use (s).
- 8. Where party who has joined in breach is a partial beneficiary.—As stated in the second paragraph of the present article, the equitable interest of a partial beneficiary who has made himself liable by joining in a breach of trust, may be stopped at the instance of his co-beneficiaries, until the whole loss to the estate has been compensated. This right of the beneficiaries, must not, however, be confused with the limited right of the trustee (treated of in article 79 supra) to impound the interest of a beneficiary who has requested, instigated, or consented in writing to a breach of trust, by way of indemnifying the trustee himself. The two rights are essentially different, and it is apprehended that beneficiaries might have the right referred to in paragraph 2 of the present article, in cases where the trustee (who is after all particeps criminis) might be refused the right of impounding the interest of the instigating beneficiary. It must also be understood that the rule

K. & J. 324; and Re Dangar, 41 C. D. 178, where the cases are collected.

<sup>(</sup>s) Moore v. Knight, (1891) 1 Ch. 547; Soar v. Ashwell, (1893) 2 Q. B. 390.

laid down in paragraph 2 of the present article, applies a fortiori to the case of a beneficiary who is also a trustee; for the liability of the beneficiary is really founded upon his having made himself a trustee de son tort. In both cases the trustee, or trustee de son tort, is personally liable, and in both cases in his capacity of beneficiary he must make good his indebtedness to the trust estate before he can claim to share in it (t). It may perhaps be suggested (with diffidence) that it is somewhat strange that the authors of the Trustee Acts of 1888 and 1893, should have inserted a section dealing with the right of the trustee to impound the interest of a beneficiary particeps criminis by way of indemnity to himself, but should have omitted to make any similar statutory provision as to the rights of co-beneficiaries to set off the loss against the share of the beneficiary in fault. This omission appears still more extraordinary when it is considered that the acts in question give the trustee the qualified right of indemnity even against married women restrained from anticipation, whereas there is no such right conferred on innocent co-beneficiaries, who took no part in the breach of trust.

9. Retainer of life income to make good breach instigated by tenant for life.—A trustee, in breach of trust, lent the trust fund to A. B., the tenant for life. The trustee afterwards concurred in a

<sup>(</sup>t) See Re Akerman, Akerman v. Akerman, (1891) 3 Ch. 212, and cases there cited.

creditor's deed, by which A. B.'s life interest was to be applied in payment of his debts, and the trustee received thereunder a debt due to him from A. B. Before the other creditors had been paid, the trustee retained the life income to make good the breach of trust. It was held, upon a bill filed by those claiming under the creditor's deed, that the court would not restrain the trustee from making good the breach of trust out of the life income; for although the trustee, being a creditor and party to the deed, had, quà himself, no right to retain the life interest, yet, as representing the cestuis que trusts, he was justified in doing so. And the Master of the Rolls said: "This bill, proposing to leave nothing but the personal liability of Knight (the trustee) for the reparation of the breach of trust, seeks to withdraw the liability of the life estate, and thus materially diminish the security of the cestuis que trusts. I cannot reconcile myself to the notion that this is a course which this court could pursue" (u).

10. Rule applies to derivative as well as to original shares.—The rule applies not only to shares taken directly under the settlement creating the trust, but also to shares purchased from or otherwise derived through or under immediate beneficiaries. Thus, where a Mrs. D., who was trustee and life tenant under a will, took assign-

<sup>(</sup>u) Fuller v. Knight, 6 B. 205; and see also Carson v. Sloane, 13 L. R. Ir. 139.

ments from two of the beneficiaries entitled in remainder, and committed divers breaches of trust which only came to light on her death, it was held that the two shares which she had purchased were liable to make good the loss to the estate. Moreover, this right of the beneficiaries was held to take priority over persons to whom Mrs. D. had mortgaged the shares in question (w). As the late Sir George Jessel, M.R., put it, in Jacubs v. Rylance (x), "In the view of this court, a trustee" and it is apprehended the principle equally applies to a cestui que trust] "who is indebted to the estate in a sum largely exceeding this fund, must be taken to have paid himself all that he can claim out of the moneys which have come to his hands, and for which he has not accounted. is not a case of impounding a trust fund. trustee has already had all that he can claim, and has paid himself." The fact that the mortgagees were bonâ fide mortgagees for value without notice was immaterial, because the equitable interest in question was a chose in action, and purchasers of choses in action take subject to all equities. Indeed, so far has this been carried, that such purchasers have been held to take subject to breaches of trust committed subsequent to the purchase (y).

<sup>(</sup>w) Doering v. Doering, 42 C. D. 203, and cases there cited; and see also Re Akerman, Akerman v. Akerman, (1891) 3 Ch. 212.

 <sup>(</sup>x) 17 Eq. 341.
 (y) Per Hall, V.-C., Hooper v. Smart, 1 C. D. 90, 98;

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11. How far beneficiary who has been innocently overpaid is liable to refund.—Where a trustee has made an over-payment to a beneficiary in error, he can recoup himself out of any other interest (if any) of that beneficiary in the trust estate (z); but the court will not, as a rule, order the overpaid beneficiary personally to refund to the trustee who has been disallowed the item in his accounts, because (it is presumed) it was not done at the instigation of the beneficiary (a). However, it would seem that a co-beneficiary could compel repayment of the excess (b); but the onus would lie upon him of proving that what the other beneficiary had received was an over-payment, having regard to the value of the estate at the date of the payment, and did not arise merely by reason of subsequent depreciation (c). This, of course, pre-supposes that payment at all, at the date in question, was proper; for otherwise, if the date for payment had not arisen, the payment would itself have been a breach of trust to which the payee would have been privy.

and see also *Morris* v. *Livie*, 1 Y. & C., Ch. 380; *Irby* v. *Irby*, 25 B. 632; *Barnett* v. *Sheffield*, 1 D., M. & G. 371; and *Cole* v. *Muddle*, 10 Ha. 186.

<sup>(</sup>z) Livesey v. Livesey, 3 Russ. 287; Dibbs v. Goren, 11 B, 483.

<sup>(</sup>a) Downes v. Bullock, 25 B. 54; Bate v. Hooper, 5 D., M. & G. 338.

<sup>(</sup>b) Harris v. Harris (No. 2), 29 B. 110.

<sup>(</sup>c) Re Winslow, Frere v. Winslow, 45 C. D. 247; Fenwick v. Clarke, 4 D., F. & J. 240; Peterson v. Peterson, 3 Eq. 111; and Hilliard v. Fulford, 4 C. D. 387.

12. Rule does not apply to legal beneficial interests.—But where a testator devised certain real estate for life to one of his executors and trustees, and the devisee afterwards committed a breach of trust, and filed his petition for liquidation, it was held that, as against the trustee in liquidation, the other cestuis que trusts had no lien on the interest of the trustee; the Lord Justice James saying: "The estate of a legal devisee is, under no circumstances, under the control of the court" (d). And in the more recent case of Re Brown, Dixon v. Brown (e), Kay, J., said: "It has always been a rule of the Court of Chancery that if a trustee misappropriates trust money, and has an equitable interest under the trust deed, the court will not allow him to receive any part of the trust fund in which he is equitably interested under the trust, until he has made good his default as trustee. That is a doctrine which is not in the least in question, and is very thoroughly established. But if the trustee has, under the will or other instrument which created the trust, a legal interest in land which is not bound by the trust at all, then the Court of Equity has no power to lay hold of that legal interest or to assert anything in the nature of a lien or charge upon it in order to recoup the breach of trust."

(d) Fox v. Buckley, 3 C. D. 511; but see Woodyatt v. Gresley, 8 Sim. 180.

<sup>(</sup>e) 32 C. D. 597; and see also Hallett v. Hallett, 13 C. D. 232, and Re Akerman, Akerman v. Akerman, (1891) 3 Ch. 212.

ART. 82.—Following Trust Property into the Hands of Third Parties.

If trust property comes into the hands of any person inconsistently with the trust, then—

- a. If such person has got the legal estate, or legal possession he will be a mere trustee for the persons entitled under the trust; unless he, or some person through whom he claims (f), has bonâ fide purchased the property for valuable consideration and without receiving notice of the existence of the trust before completion of the purchase, and before payment of the purchasemoney (g).
- $\beta$ . If he has not got the legal estate (h),

(f) Harrison v. Forth, Pr. Ch. 51; Martins v. Joliffe, Amb. 313; M. Queen v. Farquhar, 11 V. 478.
(g) Bassett v. Nosworthy, 2 W. & T. L. C. 1; Boursot v.

(h) See per Lord Westbury, Phillips v. Phillips, 4 D., F. & J. 208.

Savage, 2 Eq. 134; Mackreth v. Symmons, 15 V. 349; Pilcher v. Rawlins, 7 Ch. App. 259; and as to the time at which the notice is effectual, Lady Bodmin v. Vanderbendy, 1 Ver. 179; Jones v. Thomas, 3 P. W. 243; Att.-Gen. v. Gower, 2 Eq. Ca. Ab. 685, pl. 11; More v. Mahow, 1 Ch. Ca. 34; and as to receipt of trust money by way of payment for services rendered, without notice of the trust, see Blundell v. Blundell, 40 C. D. 370; and as to transfer of shares in a company which forms part of a trust estate, see London, &c. Co. v. Duggan, (1893) App. Cas. 506.

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or if the property is a chose in action (i), he will be a mere trustee notwithstanding that he purchased it bonâ fide for value and without notice; unless (being a chose in action) the property consists of a negotiable instrument (k), or an instrument which was intended by the parties to it to be transferable free from all equities attaching to it (l).

ILLUST.-1. Relative rights of legal and equitable claimants.—The rule enunciated in this article is derived from two well-known maxims, viz.: (1) where the equities are equal the law prevails; and (2) as between mere equitable claimants qui prior in tempore, potior in jure est. In fact, where one of two innocent parties must suffer, then as equity is not called upon to interfere on behalf of either of them, the common law must take its course, and he who has got the legal estate, or its equivalent, will take priority over him who has a mere equitable claim, notwith-

<sup>(</sup>i) Turton v. Benson, 1 P. W. 496; Ord v. White, 3 B. 357; Mangles v. Dixon, 3 H. L. Cas. 702; Doering v. Doering, 42 C. D. 203. (k) Anon., Com. Rep. 43.

<sup>(</sup>l) Re Blukeley Co., 3 Ch. App. 154; Re General Estates Co., ibid. 758; Crouch v. Crédit Foncier, 8 Q. B. 374; and see Judicature Act, 1873, s. 25.

standing that the title of the legal claimant may have accrued after that of the equitable one. rule is very strikingly and completely illustrated by the ease of Care v. Care (m). There a trustee, who was a solicitor, fraudulently misappropriated the trust fund, and with it bought an estate which was conveyed to his brother. The brother then mortgaged the property by legal, and afterwards by equitable mortgages, the solicitor trustee acting on all such occasions as the solicitor both for mortgagor and mortgagees. The parties beneficially entitled under the trust claimed to follow their trust money into the property which had been bought with it, on the ground that, as the solicitor of the mortgagees had notice of the breach of trust, that notice must be imputed to the mortgagees themselves. It was, however, held that, as the solicitor was a party to the fraud, notice of the equity of the beneficiaries could not be constructively imputed to the clients, the mortgagees, as the conduct of the agent raised a conclusive presumption that he would not communicate to the client the fact in controversy, and that consequently their equities and the equity of the beneficiaries were equal; whence it followed, on the maxim "where the equities are equal the law prevails," that the legal mortgagee, having the legal estate, took priority over the beneficiaries, but that the latter took priority over

<sup>(</sup>m) 15 C. D. 639.

the equitable mortgagees, because their equity was first in point of date.

2. Again, the trustees of a settlement advanced the trust money on the security of real property which was conveyed to them by the mortgagor, the mortgage deed noticing the trust. The surviving trustees of the settlement afterwards reconveyed part of the property to the mortgagor on payment of part of the mortgage money, which he forthwith appropriated. The mortgagor then conveyed that part of the property to new mortgagees, concealing, with the connivance of the trustee, both the prior mortgage and the reconvevance. When the fraud was discovered, the beneficiaries under the settlement filed a bill against the new mortgagees claiming priority; but the court refused to interfere, Lord Justice James saying: "I propose to apply myself to the case of a purchaser for valuable consideration without notice, obtaining on the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage; and, according to my view of the established law of this court, such a purchaser's plea of a purchase for valuable consideration without notice, is an absolute, unqualified, unanswerable plea to the jurisdiction of this court. . . . In such a case a purchaser is entitled to hold that which. without breach of duty, he has had conveyed to him " (n).

<sup>(</sup>n) Pilcher v. Rawlins, 7 Ch. App. 259.

- 3. Notice of doubtful equity.—It would seem that a bonâ fide purchaser for value would not be bound by notice of a very doubtful equity; for instance, where the construction of a trust is ambiguous or equivocal (o); but where he is ignorant of any well-understood doctrine of equity, such, for instance, as that relating to the separate estate of married women (p), he will not be excused.
- 4. Notice of lien of unpaid vendor.—So, where there is a lien for unpaid purchase-money (which, as we have seen, burdens the estate with a trust pro tanto), a subsequent purchaser with notice of the lien (such, for instance, as that which was formerly (but is no longer) constructively afforded by the absence of an indorsed receipt on the conveyance (q)), will take the estate subject to it (r).
- 5. Notice of prior contract for sale by subsequent purchaser.—Again, A. contracted with B. for the purchase of property in fee, in ignorance that B. was only entitled to an estate pur autre vie, and that B.'s wife was entitled to the remainder in fee. D., with full knowledge of this

<sup>(</sup>o) Hardy v. Reeves, 5 V. 426; Cordwell v. Mackrill, Amb. 516; Warwick v. Warwick, 3 At. 291; but see and consider per Lord St. Leonards, Thompson v. Simpson, 1 Dr. & War. 491.

<sup>(</sup>p) Parker v. Brooke, 9 V. 583.

<sup>(</sup>q) 2 Prest. Conv. 429.

<sup>(</sup>r) Mackreth v. Symmons, 15 V. 349; and see also as to dealings with property after notice of prior equities, Société Générale v. Walker, 11 App. Cas. 20, and Bradford Bk. v. Briggs, 12 ibid. 29.

contract, took a conveyance, from B. and his wife, of the fee simple. A. then sued for specific performance, and it was held that, as D. had notice of this contract, A. was entitled to a conveyance from D. of B.'s interest, with compensation in respect of the interests of B.'s wife, which B. was unable to bind without her consent (s).

6. What constitutes notice.—The subject of notice is now governed by the 3rd section of the Conveyancing Act, 1882, which is retrospective, and therefore the old cases may be considered obsolete, except so far as they may throw light on the construction of the new rules. Notice is usually spoken of as either actual or constructive. Actual notice, under the new law, is defined as "an instrument, fact, or thing which is in the party's own knowledge." Constructive notice is defined as "an instrument, fact, or thing which would have come to the party's knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him, or which (in the same transaction with respect to which the question of notice arises) has come to the knowledge of his counsel, solicitor, or agent as such, or would have come to the knowledge of his solicitor or agent if such inquiries and inspections had been made as ought reasonably to have been made by them."

7. Actual notice.—With regard to actual notice, knowledge is absolutely necessary. Mere gossip

<sup>(</sup>s) Barnes v. Wood, 8 Eq. 424.

or report is not sufficient. Whether the notice must be given by a party interested or his agent is perhaps doubtful. Lord St. Leonards seemed to think that it must. Mr. Dart, on the other hand, doubted it, and said it is one thing to say that "mere flying reports are not notice, and another to affirm that a purchaser could not be affected by a deliberate and particular statement of an adverse claim, unless made by a party interested. The credibility of the informant must surely be considered: nor does there seem to be any reason why, where notice has been given to the purchaser prior to the commencement of the treaty, the court should not consider whether such notice must not have been present to his mind during the treaty." That passage was written by Mr. Dart before the passing of the Conveyancing Act, 1882, and that statute seems to adopt his view, as the definition of actual notice (therein differing from the definition of constructive notice) does not state that the instrument, fact, or thing, must have come to the party's knowledge in the same transaction, nor have been notified by a party interested. Indeed, it would seem that actual notice is entirely a matter of evidence, and if the court comes to the conclusion that a party had in fact at the date of the transaction, such knowledge as would operate on the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired, then he will be taken to have had actual notice, whether he acquired his knowledge before or at the time of the transaction, and whether he acquired it from a party interested or not (t).

8. Constructive notice.—With regard to constructive or imputed notice, on the other hand, it is quite clear that a man is not liable for notice acquired by his counsel, solicitor, or agent, unless it has come to their knowledge in the very transaction with respect to which the question of notice The fact that a solicitor has been in the habit of acting for a particular person cannot reasonably constitute that solicitor the agent of the client to bind him by receiving notices or information; for non constat that the client may not have ceased to regard him as his solicitor (u). It has also been held that constructive notice of an equity through counsel, solicitor, or agent, is not imputed to the client, where the counsel, solicitor. or agent is party to a fraud which would be exposed if he had communicated the notice to his client (x). This case (Care v. Care) must, however, be carefully distinguished from the earlier cases of Boursot v. Sarage (y), and Bradley v. Riches (z), which seem at first sight in direct conflict with it. The point in Boursot v. Savage was, that where a client has notice of the existence of a trust, and intends to get the

<sup>(</sup>t) Lloyd v. Banks, 3 Ch. App. 448; and see also London, &c. Co. v. Duggan, (1893) App. Cas. 506, and Redman v. Rymer, 60 L. T. 385.

<sup>(</sup>u) Saffron Walden v. Rayner, 14 C. D. 406. (x) Cave v. Cave, 15 C. D. 639, cited as the 1st Illust. to this article.

<sup>(</sup>y) 2 Eq. 134. (z) 9 C. D. 189.

equitable interests of beneficiaries from them, the fact that he gets the legal estate from a trustee who happens to be his solicitor, does not protect him if the solicitor forges the signatures of the beneficiaries. For he had notice of the equitable interests, and the fact that he was the innocent victim of a forgery does not give him an equal equity with the beneficiaries. In Bradley v. Riches the point decided was, that the presumption that a solicitor has communicated to his client facts which he ought to have made known is not rebutted by proof that it was the solicitor's interest to conceal the facts. There the fact omitted to be communicated was the existence of a valid mortgage; whereas in Cave v. Cave the fact omitted to be communicated was the prior commission of a fraud by the solicitor himself.

9. There is another species of imputed notice mentioned in the Conveyancing Act of 1882, of quite as much importance as that mentioned in the last illustration, viz., notice of "an instrument, fact, or thing which would have come to the party's knowledge, or to the knowledge of his solicitor or agent (not his counsel), if such inquiries or inspections had been made as ought reasonably to have been made by them." Thus, it has been held that whenever a purchaser, mortgagee or lessee, forgoes his strict rights to title, whether by express contract or even by not negativing implied statutory conditions, he runs the risk of having constructive notice imputed to him of anything contained in any of the documents which he ought

to have examined (a). It must also be borne in mind, that notice of the existence of a deed affecting the title, or which necessarily affects it, is notice of its contents if it can be got at. "Of course there may be cases where the deed cannot be got at, or for some other reason where, with the exercise of all the prudence in the world, you cannot see it, and then there will be no constructive notice affecting the title. There is also a class of cases, of which I think Jones v. Smith (b) is the most notorious, where a purchaser is told of a settlement which may or may not affect the title, and is told at the same time that it does not affect it, and in such cases there is no constructive notice. Supposing, as in Jones v. Smith, you are buying land of a married man, and you are told at the same time that there is a marriage settlement, but that it does not embrace the land in question, you have no constructive notice of its contents. Because. although you know there is a settlement, you are told it does not affect the land at all. If every marriage settlement necessarily affected all a man's land, then you would have constructive notice; but as a settlement may not relate to his land at all, or only to some other portions of it. the mere fact of your having heard of a settlement does not give you constructive notice of its contents if you are told at the same time that it does not

<sup>(</sup>a) Patman v. Harland, 17 C. D. 355.(b) 1 Ha. 43.

affect the land" (c). A similar instance of the same rule occurs in the case of mortgages, where the purchase-money is expressed to be advanced by several mortgagees on a joint account. No doubt in ninety-nine cases out of a hundred such mortgagees are trustees; but as there is nothing on the face of the deed to show that the money is trust money, and as the fact of persons advancing money on a joint account does not necessarily imply that it is trust money, a purchaser or transferee never inquires whether there is a trust.

10. In addition to documents, constructive notice may be imputed to a purchaser from the state, appearance or occupation of property. For instance, the existence of a sea-wall bounding property has been held to give constructive notice of a liability to keep it in repair (d). So notice of a tenancy is notice of its terms; and generally, where a person purchases property where a visible state of things exists, which could not legally exist, or is very unlikely to exist without the property being subject to some burden, he is taken to have notice of the nature and extent of the burden (e).

11. Absence of notice will not protect a volunteer.—If an alience of trust property is a volunteer, then the estate will remain burdened

<sup>(</sup>c) Per Jessel, M. R., Patman v. Harland, supra.

<sup>(</sup>d) Morland v. Cook, 6 Eq. 252. (e) Allen v. Seckham, 11 C. D. 795.

with the trust, whether he had notice of the trust (f) or not (g); for a volunteer has no equity as against a true owner.

- 12. Transfer of fund into court equivalent to alienation for value.—However, some transfers, apparently voluntary, have been held to be equivalent to alienations for value. Thus, in Thorndike v. Hunt (h), a trustee of two different settlements having applied to his own use funds subject to one of the settlements, replaced them by funds which, under a power of attorney from his cotrustee under the other, he transferred into the names of himself and his co-trustee in the former. In a suit in respect of breaches of trust of the former settlement, the trustees of it transferred the fund thus replaced into court, and it was held by the Court of Appeal that the transfer into court was equivalent to an alienation for value without notice, and that the beneficiaries under the other settlement could not follow the trust fund.
- 13. Part of trust fund in court transferred to a separate account.—So incumbrancers on a fund in court which has been transferred to a separate account before the incumbrances were created, are not postponed to prior equitable claims of other beneficiaries under the same settlement, subsequently discovered (i). For, when a fund is

(i) Re Eyton, Bartlett v. Charles, 45 C. D. 458.

<sup>(</sup>f) Mansell v. Mansell, 2 P. W. 678.
(g) Ibid.; Spurgeon v. Collier, 1 Ed. 55.
(h) 3 D. & J. 56; and see Case v. James, 3 D., F. & J. 256; and Dawson v. Prince, 2 D. & J. 41.

carried over to a separate account in an action for administering the trust, it is released from the general questions in the action, and becomes earmarked as being subject only to the questions arising upon the particular matter referred to in the heading of the account (k). All other questions are in fact treated as res judicata. That fund has been awarded by the court to the parties falling under the heading of the separate account, and it is too late for others to try to upset the court's award. It is in fact equivalent to a transfer of the legal estate or interest.

- 14. Purchaser with notice from purchaser without.—A purchaser with notice from a purchaser without notice is safe; for if he were not, an innocent purchaser for value would be incapable of ever alienating the property which he had acquired without breach of duty, and such a restraint on alienation would necessarily create that stagnation against which the law has always set its face (l).
- 15. Where equities are equal, and no legal estate in either claimant.—Where a trustee, holding a mortgage (m) or a lease (n), deposits the deed with another to secure an advance to himself, the lender will have no equity against the cestuis que trusts, however bonâ fide he may have acted, and however

<sup>(</sup>k) Per Lord Langdale, M. R., Re Jervoise, 12 B. 209.
(l) See cases cited note (f), supra, p. 612.
(m) Newton v. Newton, 4 Ch. App. 143; and Joyce v. De Moleyns, 2 J. & L. 374.

<sup>(</sup>n) Re Morgan, Pillgrem v. Pillgrem, 18 C. D. 93.

free he may have been of notice of the trustee's fraud; for he has not got the legal estate, and therefore his equity, being no stronger than that of the cestuis que trusts, the maxim, "Qui prior in tempore, potior in jure est" applies.

16. On the same principle, where a trustee has wrongfully spent trust funds in the purchase of property, and then sold such last-mentioned property to a third party without notice, then, if the legal estate has not been conveyed to the third party, the cestuis que trusts will have priority over him (o). For they have a right (as has been shown in Art. 73) to follow the trust fund into the property into which it has been converted, and to take it or to have a charge upon it, at their election; and as their right was prior in time to that of the third party, and as he has not got the legal estate, the maxim above referred to applies (p).

17. Choses in action are assigned subject to all equities.—It is upon this principle that choses in action are generally taken subject to all equities affecting them. Thus, in Turton v. Benson (q), a son, on his marriage, was to have from his mother, as a portion, a sum equal to that with which his intended father-in-law should endow the intended wife. The son, in order to induce the mother to give him a larger portion, entered into a collusive

<sup>(</sup>o) Frith v. Cartland, 2 H. & M. 417.

<sup>(</sup>p) And see as to deposit of share certificates forming part of a trust estate, *Powell* v. *London and Provincial Bank*, 41 W. R. 545.

<sup>(</sup>q) 1 P. W. 496.

arrangement with the father-in-law, whereby, in consideration of the latter nominally endowing his daughter with 3,000%, the son gave him a bond to repay him 1,000%, part of it. This bond, being made upon a fraudulent consideration, was void in the hands of the father-in-law, and it was held that, being a chose in action, he could not confer a better title upon his assignee.

18. Negotiable instruments.—Negotiable instruments are, however, an exception to the rule as to choses in action passing subject to all prior equities. For the common law, with regard to them, adopted the custom of merchants, and recognized that such instruments were transferable. Consequently, the transfere of a negotiable instrument has a legal, as well as an equitable, interest; and where the equities are equal he is protected against prior equities by his legal title (r). Of course, however, where the transferee has notice (express or imputed (s)) of prior equities, he will be postponed.

19. Bonâ fide purchasers from trustees cannot after notice get legal estate from them.—The bonâ fide purchaser of an equitable interest, without

(s) See Lord Sheffield v. London Joint Stock Bank, 13 App. Cas. 333.

<sup>(</sup>r) London Joint Stock Bank v. Simmons, (1892) App. Cas. 201. It is not infrequently a task of difficulty to determine whether debentures issued by public companies are negotiable instruments passing free from undisclosed equities or not. As to this, the reader is referred to Re Natal Co., 3 Ch. App. 355; Re General Estates Co., ibid. 757; and Re Romford Canal Co., 24 C. D. 85.

notice of an express trust, cannot defend his position by subsequently, and after notice, getting in an outstanding legal estate from the trustee; for by so doing he would be guilty of taking part in a new breach of trust (t). But if he can perfect his legal title without being a party to a new breach of trust (as, for instance, by registering a transfer of shares which have been actually transferred before notice, or by getting in the legal estate from a third party), he may legitimately do so (u).

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(u) Dodds v. Hills, 2 H. & M. 42+.

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<sup>(</sup>t) Saunders v. Dehen, 2 Ver. 271; Collier v. McBean, 34 B. 426; Shurples v. Adams, 32 B. 213; Carter v. Carter, 3 K. & J. 617.



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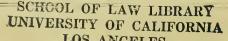
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